

REPORT OF THE SUB-COMMITTEE ON
RECOMMENDED ACTION
FOR MARGINALISED SECTIONS OF THE SOCIETY

SOCIAL JUSTICE COMMITTEE
e-COMMITTEE
SUPREME COURT OF INDIA

MARGINALISED
SECTIONS OF
THE SOCIETY



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SOCIAL JUSTICE COMMITTEE

REPORT OF THE SUB-COMMITTEE ON RECOMMENDED ACTION FOR MARGINALISED SECTIONS OF THE SOCIETY

November 2022

The Sub committee was constituted by Honble Justice D.Y.Chandrachud, the Chief Justice of India ,and Patron in chief/Chairperson eCommittee for addressing the issues faced by marginalised sections of society and to explore the ways of extending access to justice across all social segments .The Report covers four identified areas, namely: Women, The LGBTQIA+ community, Disability, Caste.

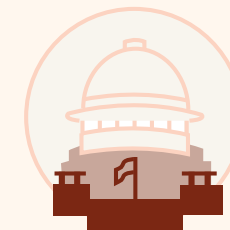
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I. INTRODUCTION



The Social Justice Committee was conceptualised by Hon’ble Justice D.Y. Chandrachud within the fold of the Supreme Court e-Committee. The sub-Committee was formed in order to provide the benefits of the e-Courts system to marginalized sections of the society, through interaction and discussion. The Sub-Committee aims to address the need of the hour of supporting the social groups who remain on the periphery of equal opportunities in general and access to justice in particular.

The vision of the e-Committee was to identify and act upon ways to bring marginalized sections of society within the fold of e-beneficiaries, i.e., reaching justice to the doorstep through digital means.

The observations of Hon’ble Justice D.Y. Chandrachud, Chairperson of the e-Committee, bring clarity in understanding the objective and purpose of the Sub-Committee.

“ICT-based platforms can provide effective outreach to sensitise stakeholders in the judicial process on issues pertaining to gender, disability and, in general, on the need for fair treatment of marginalised segments of society. This exercise needs to be carried out at different levels. At a basic level, it is necessary to provide a statement of principles and interpretative techniques for judicial decision making, based on judicial precedent and enabling legislation which govern the field. Going beyond substantive principles, it is necessary to create an awareness of how gender based and other stereotypes can deflect the cause of fair and equal treatment. Creating an awareness of how these stereotypes arise in the judicial process will enable decision makers to address the concerns of those among the above groups who face the consequence of stereotyping. Adopting forms of communication which are neutral and eschewing arcane terms which have deep rooted stereotypes intrinsic in their usage is another important facet which needs attention. Attention also needs to be focused on the processual mechanisms which are in place and those which should be developed to address the requirement of a fair judicial process consistent with constitutional values. The ICT infrastructure of the e-Committee can be utilised to enhance the quality of institutional processes, facilities and

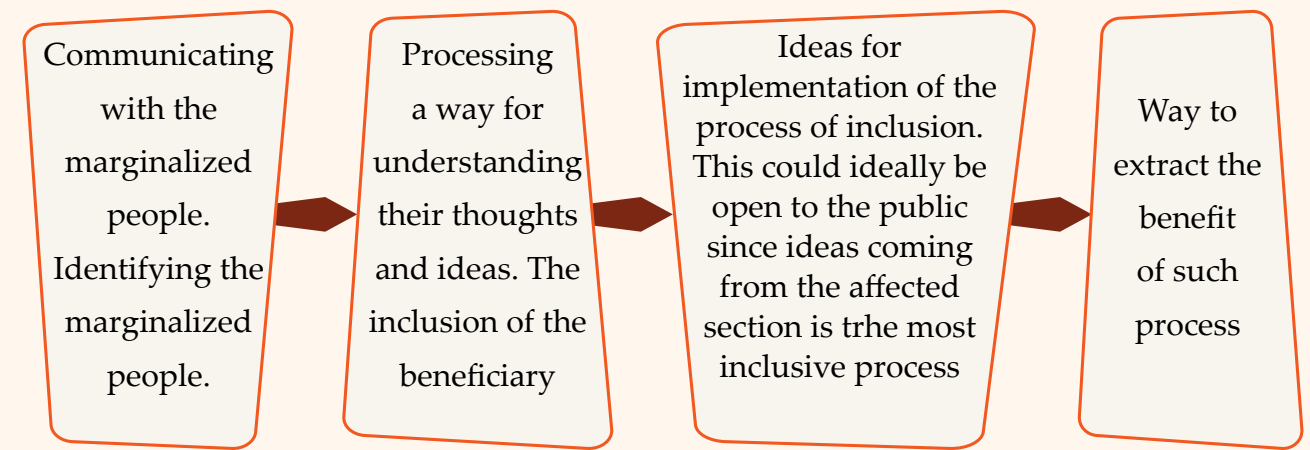
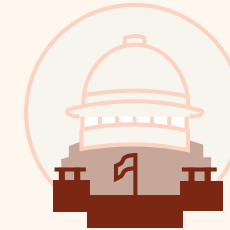
outcomes based on principled applications of constitutional doctrine. ICT based tools can also enhance the quality of judicial education, by engaging with judicial academies.”

Despite several Constitutional protections, crimes against women, children, and members of the LGBT community, the Scheduled castes/Scheduled tribes, persons with disability and other socially marginalised groups continue to pose challenges at many levels. To that extent, and to preserve the Constitutional goals of our country, the foremost objective of the Committee is to identify the marginalised sections of the society and their specific problems, and structure a framework for a more inclusive environment where justice can be made readily available to them.

The Report has been prepared by the Sub-Committee, essentially to collate the research and ideas relating to the betterment of the specific social groups mentioned above.



II. IDENTIFYING THE BENEFICIARY



The Agenda of ‘Identifying the Beneficiary’ was developed through discussion by creating modules for successive stages which would aid in reaching the end objective of making justice available to the beneficiary.

The sub-committee has held various meetings and interactions, and presented a report dealing with three marginalized sections, namely, women, members of the LGBTQIA+ community, senior citizens and persons with disabilities. A presentation was also given in this regard and it was agreed that the said three segments would also need to be expanded to include marginalized sections of society who are discriminated against on the basis of caste.

In the final Report presented by the sub-committee, four groups have been identified, namely- Women, the LGBTQIA+ community, Disability and Caste. It is pertinent to mention that while these socio-legal categories have been identified for the sake of providing specific recommendations, there is a fair bit of overlap between these categories since social groups are often marked by multiple identities, including intersectional identities of marginalization.

The Sub-Committee consists of Justice Moushumi Bhattacharya (Chairperson), Justice Prathiba Singh, Professor Jhuma Sen, Justice Prabha Sridevan and Ms. Arulmozhiselvi Ramesh

1. A Concept Note on the ways in which facilities can be provided to women for ensuring better access to justice at the ground level.
2. A few of the areas of discrimination against the LGBTQIA+ community and an Action-Plan for integration of the community.
3. Note on disability which summarizes key developments in disability justice and provides recommendations for ensuring better access to justice.
4. A concept note on caste consists of the historical perspective and judicial intervention, as well as the role of law enforcement agencies.
5. Justice Prabha Sridevan provided her inputs on the identified beneficiaries. In her words,

“Our task was to address the need for fair treatment of the marginalized sections of the society that lie underneath this effort, to state the principles and interpretative techniques for judicial decision making, and uncover the implicit biases that hinder fair and equal treatment in courts thereby belying the constitutional promises. In these reports the groups chosen are politically, economically, socially and otherwise, the less powerful groups or the “Other”. Their voices get drowned by the louder voices of the powerful groups. It is the duty of the judges to bridge the gap between the two groups and hear the Others. The reports enclosed identify the groups, describe the “exclusion” and structure the techniques to be adopted. “Our society as a whole is demeaned when state action intensifies rather than mitigates their marginalisation. The integrity of the rights-based vision of the Constitution is punctured when governmental action augments rather than reduces denial of the claims of the desperately poor to the basic elements of a decent existence” (Port Elizabeth Municipality v. various occupiers Constitutional Court of South Africa). Implicit biases are like lurking mines, and will destroy equal treatment.”

She adds; “The important phrase used in the directions given to this committee, is “identifying the beneficiary”. To identify a person, we first have to see her or him. The three groups subject matter of the three reports are by and large, invisible, the women, the people with disabilities, and the LGBTQ+ people. They do not impinge on the collective consciousness usually unless a special effort is made. This is because we have implicit biases that are like lurking mines. If their access to justice is made easy, then alone we can claim that we have achieved the aims of our Preamble. So that special effort must be made.

The three reports not only speak of the difficulties of the three groups, more importantly they give practical tools to achieve the object of bridging the gap between them and the goal of justice, justice not only what is delivered in courts, but social and economic justice too. We must acknowledge that the discrimination, the exclusion and the lack of access have collateral consequences. The injustice is perpetuated.

The Centre for Women and the Law (‘CWL’) and the Law and Society Committee at NLSIU, Bangalore along with the Leaflet had brought out an edited volume titled ‘The Gendered Contagion: Perspectives on Domestic Violence during COVID 19’. If a group is marginalized, or discriminated against, the marginalization or discrimination gets magnified during abnormal times. And these are times out of joint. The gap has to be urgently narrowed.

Bryan Stevenson of Just Mercy in his speech at the Stanford University said that one must get proximate to the spaces where there is discrimination. He was referring to racism. We need to get closer to the spaces where there is discrimination for whatever reason, and face up to the discomfort.

Facing up to the discomfort is what the Madras High Court did in the recent case S. Sushma and A. Seema v. Commissioner of Police and others. Justice Anand Venkatesh said he had to unlearn his opinion about same-sex marriage and understand the truth about the LGBTQ+ community. This must be done instead of perpetuating the stereotypes, myths and mental baggage.

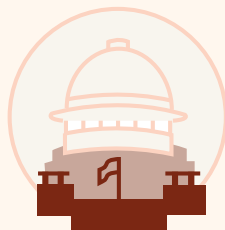
The Supreme Court recently identified three more groups that deserve attention and reach out.

- G *The children who have lost their parents to COVID, need special attention. The guidelines given in the report for women, may be tweaked a bit and they will work for this group too.*
- G *Our people who do not have tech knowledge. Of what use are any number of apps to them? How is the State planning to reach out to them and extend the benefits to them? This is a group which is excluded.*
- G *The under-trial prisoners. This group is within the State’s custody and yet excluded. With digitalization, it must be easy to identify the under-trials who have undergone the maximum punishment that could be imposed on them even if they are found guilty. Why continue the incarceration. If the prisoner is the sole breadwinner, then the collateral damage continues so long as the incarceration continues.*

The reports said that many of the beneficiaries are not even aware of DLSA services. Every Doordarshan or radio channel must provide this information in the language spoken in that State. This should be easily accomplished.

6. Ms. Arulmozhiselvi Ramesh, as the Co-ordinator, was the valuable facilitator of the interactions within the group and maintained a record of the work-in-progress including updating the members of the work of the Supreme Court e-Committee.

III. RECOMMENDATIONS



A. RECOMMENDATION 1: WOMEN- 'STRI-SEWA' SCHEME:

- (i) WOMEN constitute a significant part of the marginalised sections in India. Empowering a woman would serve to empower the entire family.
- (ii) Access to legal aid for availing of various everyday basic needs is crucial for Women. The purpose of this Scheme is to provide *LEGAL AID AT THE DOORSTEP* for women.
- (iii) The objects of NALSA should be integrated with ICT infrastructure.
- (iv) **Stri-Booths** would be set up in every local village. Each Stri-Booth would have a Stri- Sewa officer called **Stri Sakhi**. She would be provided with a computer and telephone, along with broadband connectivity.
- (v) There are a total of approx. 10 lakh polling stations. One Stri-Sakhi is to be provided for 2 polling stations and would thus serve a community with 2000 voters.
- (vi) All **Stri Sakhis** shall be supervised by a **NALSA** officer. The said officer could be a teacher or professor at any of the following institutions:
 - G Any Government school in the local area;
 - G Any Government college in the local area;
 - G If none are available, local municipal building.
- (vii) The District Judge of each District shall supervise the NALSA officers in the District.

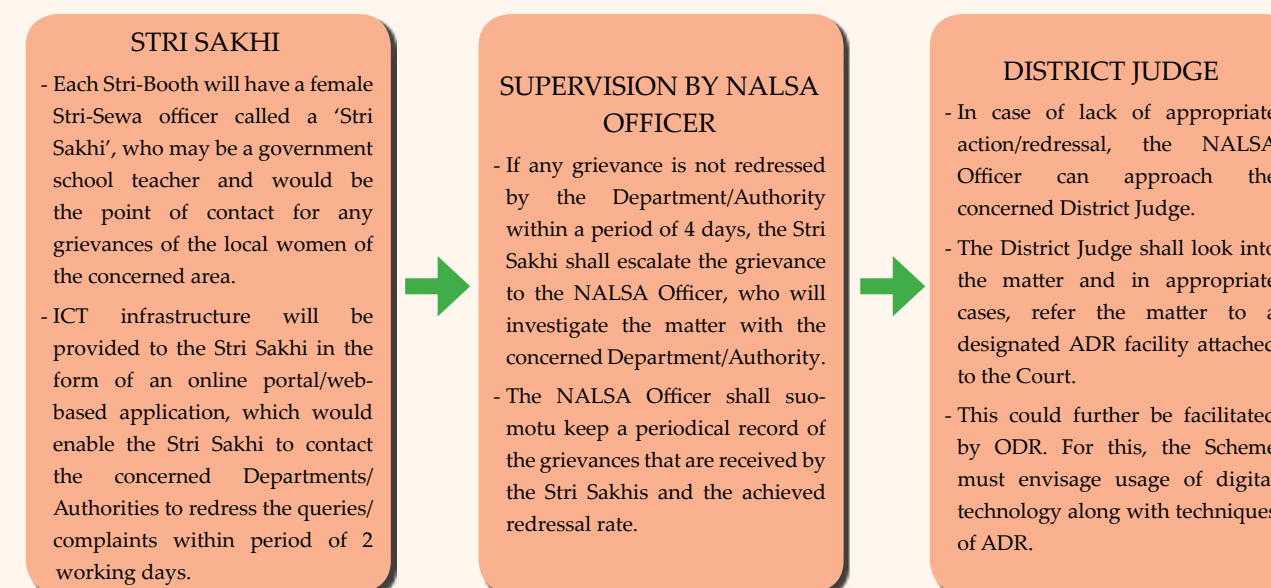
(viii) Routing of complaints/grievances shall be in the following manner:

G A pictorial depiction of the process is as follows:



(ix) Flow chart showing the whole process:

ESCALATION MATRIX



(x) The **Stri-Booth** would be connected to all local services –

- In **Phase I** - electricity, water supply, telephone/internet provider, bank, Aadhar agency, ration agency, police station, municipal service provider, road maintenance agency, school, college, university, passport office, insurance company, etc.
- **Phase II** - Even private service providers such as appliance sellers who need to service their appliances, smart phone companies who need to provide warranty services, etc. could be connected.

- (xi) If any woman approaches a Stri-booth for any of the services offered, the Stri-Sakhi shall be the first point of contact who would be computer trained. Stri-Sakhis could be a local government school or college teacher who is willing to be trained. At any point, at least four Stri-Sakhis should be trained so that they can man the booths by turns. They could also be assisted by local school/college students who could be rewarded with credits for their volunteering work.
- (xii) If the Stri-Sakhi is unable to sort out a specific grievance within 2 days, the same would be escalated to the NALSA officer of that district where it shall remain for four days. Legal aid can be provided at this stage if needed. Thereafter it can be addressed by the officer appointed by the District Judge who can then refer to the ADR facility.
- (xiii) **OBJECT TO BE ACHIEVED:** Every woman who has a grievance can hope to get redressal by simple coordination between the Stri-Booth and the agency concerned. Most grievances ought to be sorted at that level.
- (xiv) The NALSA would be the nodal authority for the entire STRI-SEWA scheme.
- (xv) The Scheme can be implemented in stages, and within ten years the entire country can be covered with the Scheme. This should reduce a large amount of litigation in courts and tribunals as well, while holding both governmental and private service providers accountable without an adversarial approach.

B. RECOMMENDATION 2:

LGBTQIA+ - 'P.R.I.D.E.'

The Note deals with marginalisation of social groups based on sex, gender and sexuality - which needs to be clarified for the purpose of sensitising the stakeholders with effective strategies that are aimed at engagement and redressal.

Part 1

Engagement with the LGBTQIA+ community begins with the understanding that gender, sex and sexuality are fluid concepts.

A working definition and identification of the spectrum have been attempted in this part which lists the terms envisaged under the LGBTQIA+ and the sub-communities which identify themselves within this larger community. **(Part 1.1)**

Part 2

Looks at strategies of communication and aims at ensuring that access to information and ways of participating in public life are made available despite location and identity. Strategies for this are highlighted in detail and includes institutions as well as other stakeholder consultations **(Part 2.1)**.

The private sector and the in-roads made in this realm are highlighted **(Part 2.2)**. This part also focuses on individual case studies and first-hand experiences of the LGBTQ community, including their response to the decriminalization of section 377 of The Indian Penal Code, 1860.

Part 3

This part deals with empowering lawyers, judges and law-makers in matters of adjudication and law-making together with effective tools of inclusion. These include making the courts accessible for interventions in the legal realm - in terms of judgments, policy and law. The salient provisions of the Transgender Persons (Protection of Rights) Act, 2019 have been given, being a significant step in the recognition of the rights of the marginalized sections of the society. The said Act provides for-

- prohibition against discrimination (section 3);
- welfare measures formulated by the government (section 8);
- constitution of the National Council for Transgender Persons (NCT).

This Part elaborates three ways to an action-oriented approach within the legal realm.

3.1 Access to Justice:

- G Criminal Justice Reforms
- G Anti-Discrimination and Horizontal Application
- G Liberal Interpretation of Existing Statutes
- G Making the Courtroom accessible

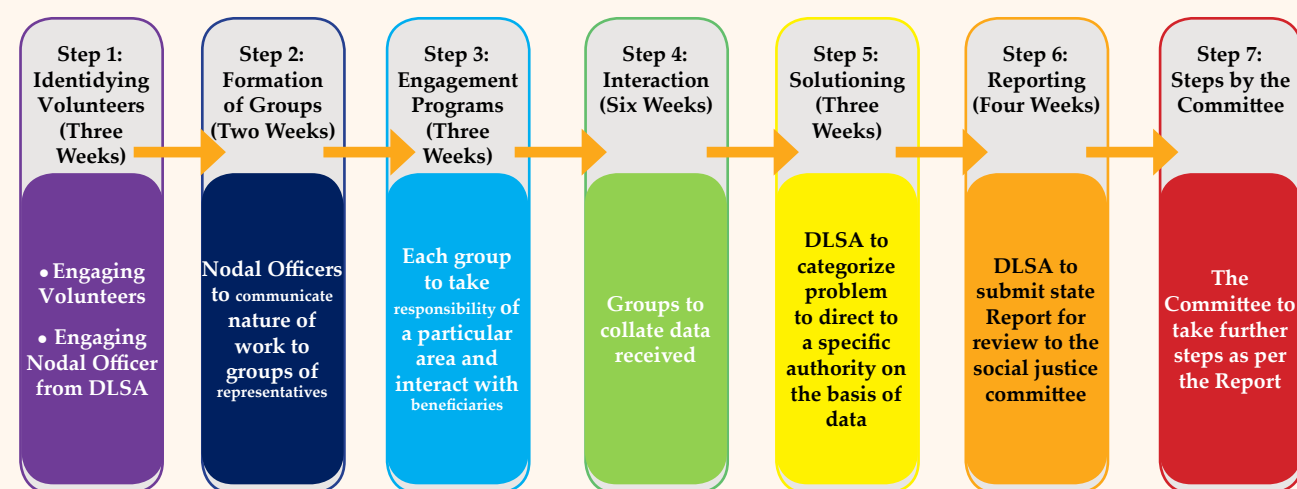
3.2 Sensitization of Courts

3.3 Implementation of Policies

- G Anti-Discrimination Laws and Affirmative Action through reservation in schools and at places of employment;
- G Questions of criminal justice through data on crimes and police action against the community;
- G Other measures dealing with actions of the Centre and the State.

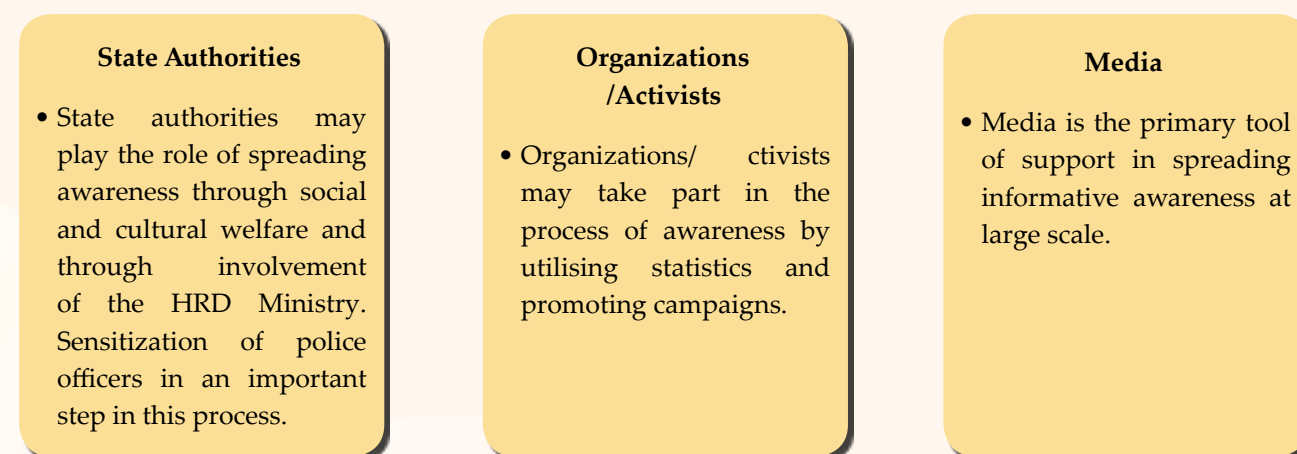
Part 4

Highlights a time-based Action-Plan which involves the intervention of lawyers and paralegal volunteers, as well as other stakeholders for identifying the beneficiary and facilitating the link between beneficiaries and government bodies/ other institutions such as Legal Services Authorities. The Action Plan rests on the pillars of- 'Identification,' 'Action,' and 'Incentive'. A representative flow-chart with respect to a step-by-step action for implementation towards the larger objective of identifying the beneficiary and understanding their concerns through their experiences is presented to emphasize the focus areas. The chart runs under the following heads:



Part 5

Highlights tools that need to be realised to ensure awareness in institutions that can make a difference as well as within the general public. This part is also understood through an action-based approach pin-pointing target groups. Awareness strategies have been effected through the State, Organisations and Media.



C. RECOMMENDATION 3:

DISABILITY- 'ACTION (ACCESSIBLE COURTS AND TECHNOLOGY FOR IMPLEMENTATION OF NON-DISCRIMINATION)'



The note is broadly divided into four parts- the *first* part traces the history of a gradual global shift from a narrow concept of *disability rights* to an emancipatory discourse on *disability justice*, and identifies some foundational principles of the disability justice framework globally and in India. The *second* part locates disability justice in India within the broader framework of equality and non-discrimination, identifies barriers to access to justice for persons with disability and proceeds to offer a glimpse into some best institutional and judicial practices for accessibility and inclusion at the policy level. The *third* part charts a concrete ACTION (Accessible Courts and Technology for Implementation Of Non-discrimination) Plan as a roadmap for the subcommittee for the purpose of further consultation. The *fourth*, and final part summarizes key recommendations.

Key findings and recommendations:

- (i) Disability exists as a form of marginality, alongside other markers of identity and marginality. An inclusive policy for persons with disabilities will be mindful of the intersectional nature of marginality. Data indicates that disability is not an isolated issue, and that policies for inclusive development and accessibility need to consider the multiple forms of marginalities like age, class, caste, sex, gender, location that disabled groups face.
- (ii) Access to justice includes not only **procedural access** (i.e., effectively engaging with the established legal system,) but also **substantive access** (i.e., equitable and beneficial judicial outcomes) and **promotional access** (i.e., promotion of citizens' belonging and empowerment).¹ It therefore not only embraces the existence of rights enshrined in laws, both procedural and substantive, but also in generating awareness about the same.
- (iii) Accessibility is obstructed by existing *judicial infrastructure*- physical, personnel as well as digital, in several ways. The first is **physical infrastructure**, which includes court buildings, rooms, features such as elevators, provisions for drinking water, etc.

¹ Eilionóir Flynn, *Disabled Justice?: Access to Justice and the UN Convention on the Rights of Persons with Disabilities* (Routledge 2016).

The second is **personnel infrastructure**, which includes judicial officers (judges), court staff (court masters, stenographers, registry staff, etc.), and lawyers. The third is **digital infrastructure**, which includes computers, information technology, and the judiciary's overall web presence (such as court websites, e-courts mobile applications, etc.).²

- (iv) **Communication support** for persons with disabilities must be institutionalized. Courts must ensure that all processes in the justice system provide technical and other support necessary for parties, witnesses, claimants, defendants, judges, lawyers and court staff to use any form of communication necessary for their full participation including assistive listening systems and devices, open, closed and real-time captioning and closed caption decoders and devices, voice, text and video-based telecommunication products, videotext displays, computer-assisted real-time transcription, screen reader software and optical readers, video description and secondary auditory programming devices that pick up audio-feeds for television programmes, supporting communication in addition to intermediaries or facilitators through the use of third parties, including note-takers, qualified sign language and oral interpreters, ensuring that all interpreters are able to interpret effectively, accurately and impartially. That they may do so receptively (i.e. understanding what persons with disabilities are saying) and expressively (i.e. having the skill necessary to convey information back to those persons), while using any necessary specialized vocabulary (e.g. legal or medical) and respecting professional and ethical standards.
- (v) **Accessible Formats:** All those departments/ offices in courts where documents are to be filed, registered or stored should have the necessary equipment to ensure that processes like filing, storing and referring could be done through accessible formats. This means that all documents should be accessed in audio/braille format by people with visual/ hearing impairments, sign language and interpretation for deaf and persons hard of hearing, easy read or video guides for persons with psychosocial or intellectual disabilities.
- (vi) **Courthouse Accessible Advisory Committees:** Setting up of Courthouse Accessible Advisory Committees with members having diverse expertise and experience at the level of the Supreme Court, High Courts and Tribunals to provide effective strategies and solutions for integrating accessibility into the design of courthouses and periodically review barriers to accessibility in the administration of justice at the institutional level for persons with disabilities.

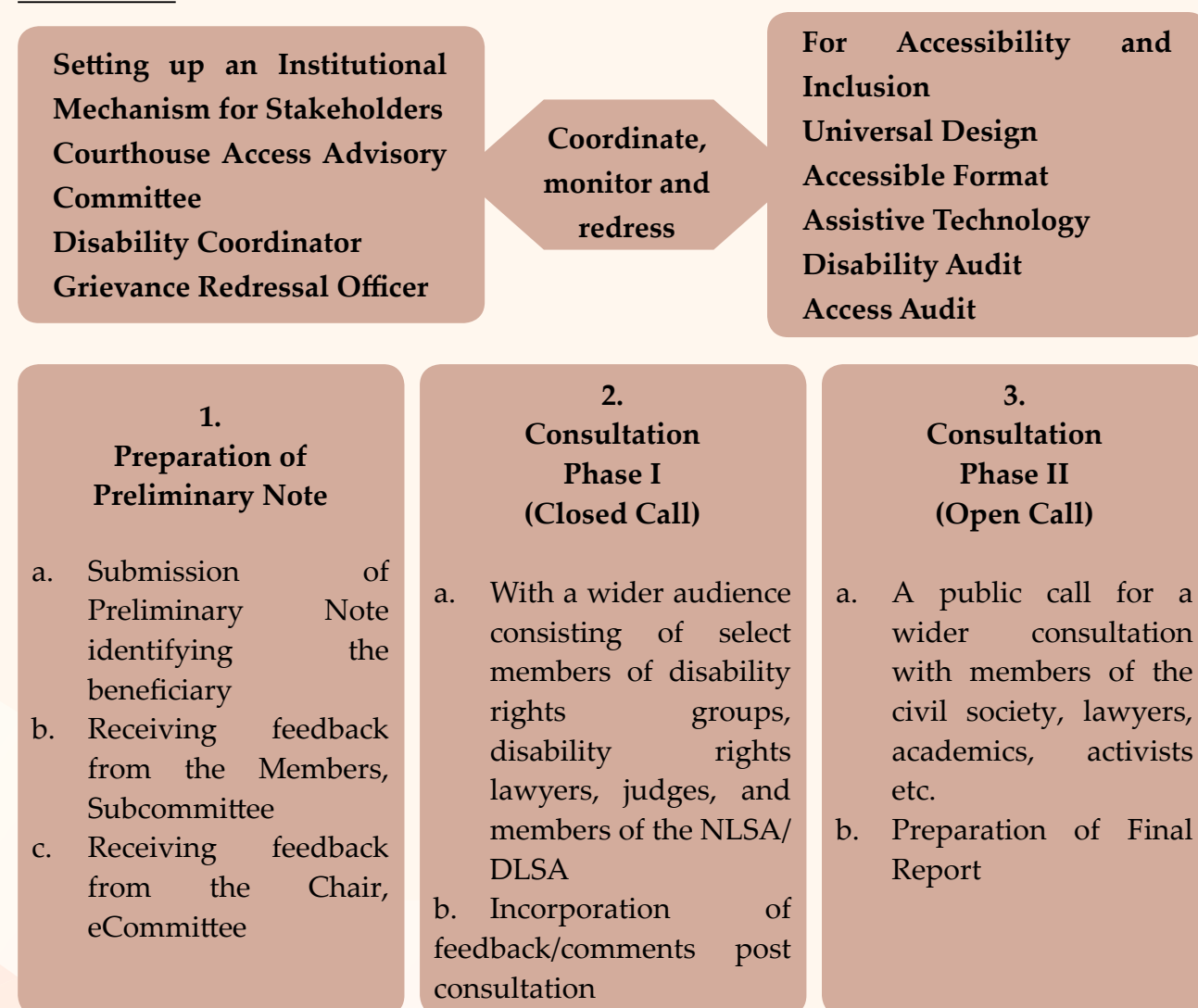
² See <https://vidhilegalpolicy.in/research/2018-4-19-status-of-physical-infrastructure-in-lower-judiciary/>

- (vii) **Disability Coordinator:** Each court should also designate a disability coordinator to handle requests for accommodations, including auxiliary aids and services, offer training and provide educational materials to judges, magistrates, commissioners, court administrators and court personnel regarding communication access.
- (viii) **Grievance Redressal Officer:** Appointment of a Grievance Redressal Officer at the Supreme Court, High Courts, and District Courts to act as a nodal point of contact for complaints and grievances.
- (ix) **Disability Audit and Periodic Audit of Infrastructure:** Currently there is no data available on the numbers of disabled persons in the court ecosystem, including court staff, judges, lawyers and litigants. Without this data, the requirements of PwD | coming to contact with courts cannot be assessed properly. No regular periodic audit or review of court infrastructure is undertaken at the state and district level by any government or judicial authorities either. The NCMS Report is substantially dated. Instead of depending on Access Audit Reports conducted by the Department of Empowerment for Persons with Disabilities, Courts will benefit by developing an institutional mechanism for periodic audits of disability and access. This can be done under the aegis of a Courthouse Access Advisory Committee modeled after similar committees in the USA to periodically review and provide guidance on accessible designs.
- (x) **NCRB Data on Disability:** National Crime Records Bureau (NCRB) must maintain data on the violent crimes committed against persons with disabilities. In addition, NCRB should collect disaggregated data by sex, age, place of residence, relationship with perpetrator and disability in case of violence and exploitation of women and girls with disabilities.
- (xi) **Overcoming Attitudinal Barrier:** Attitude, knowledge and awareness of stakeholders in the justice delivery system including police officers, lawyers, judges, court staff and others on how to accommodate persons with disabilities and make justice more accessible and inclusive is extremely important. This can only be achieved by awareness training and capacity building among all stakeholders in the law enforcement and justice sector.³ Needless to assert, training programs ought to be developed in close collaboration with persons with disabilities and groups working on disability rights and implemented through the National Judicial Academy and State Judicial Academies. The National Legal Service Authority and the State Legal Service Authorities should work in close collaboration with the judicial academies in developing training modules and facilitating these training.

³ <https://www.un.org/esa/socdev/documents/disability/Toolkit/Access-to-justice.pdf>

- (xii) Accessibility in Peripheral Legal and Quasi-Judicial Authorities: In peripheral legal and quasi-judicial authorities (e.g. Police, Commissioners in different sectors, Labour courts, family courts, etc.) accessibility is virtually absent. All legislative, administrative and operational reforms concerning these shall include provisions for accessibility, reasonable accommodations and awareness about the same to persons with disabilities.
- (xiii) Judicial Performance Index: Judicial Performance index ought to keep track of accessible facilities and reasonable accommodations provided to persons with disabilities in different cases/judicial proceedings at the Supreme Court, High Courts & District Courts.
- (xiv) Special Courts: Setting up of Special Courts following Section 84 of the RPD Act, which provides a framework to enable people with disabilities to approach the Special Court in case of infringement of their rights and to achieve speedy justice. Till date, Special Courts have not been set up in all states.

Action Plan



D. RECOMMENDATION 4:

CASTE: ASMITA (ALLIANCE FOR SOCIALLY MARGINALISED INDIVIDUALS THROUGH TECHNOLOGY IN ACTION)

This note is divided broadly into three parts, namely first, identifying of the beneficiary, second -caste-based discrimination, law and police and third, the role of judiciary and other aspects. A summary of each of these parts and recommendations is provided below:

(i) The Category of Caste – Identifying the Beneficiary

- G This note gives an overview of how the beneficiaries of the caste system need to be recognized.
- G It gives an understanding of the caste system as per Hindu texts and the Varna system.
- G The effect of colonial rule in solidification of the caste categories has been highlighted in Note 2.
- G The treatment of the caste categories in a post-British era has also been discussed in this note. It observes that the Indian government carried forward the colonial policy of protecting STs.
- G It also discusses the judicial treatment of caste categories in brief, like in the case of Indira Sawhney –II, wherein the creamy layer was excluded from the benefits of reservation.
- G This note also clearly demarcates the nomenclature used in respect of the caste system, defining terms like Varna, Jati, Shudras, SC, ST, Swarn, Harijan, etc.

(ii) Caste-based discrimination, law & police

- G This note gives us an overview of the nature and extent of caste-based discrimination, along with the role of the police in mitigating the same.
- G It details the regulatory framework of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter 'POA'), along with the Constitutional safeguards against discrimination.
- G This note also gives an analysis of why there is a high rate of acquittal in cases under the POA. These reasons include hostile witnesses, misuse of the POA leading to wariness amongst the judiciary in granting conviction, police inaction and a lack of designated courts to deal with atrocity cases.
- G It also lays out recommendations to ameliorate the condition of law enforcement framework. These recommendations include sensitization drives for police

departments, recruiting Dalits into all levels of the police force, training of district officials to enforce the POA, utilizing text messaging services and social media used to share information about the POA, including helpline numbers, etc.

(iii) Caste Issues – The Role of Judiciary and Other Aspects

- G This note begin by identifying two concerns related to the rights of the marginalized sections of society – Protection and Adequate Representation.
- G After identifying the problems, the note analyses the role of the judicial precedents in the matter of upliftment of the marginalized castes.
- G This note also assesses the theoretical and practical basis for determining the usage of the term ‘backward’. Here, it notes the economic criteria, educational backwardness, geographical criteria and caste-class dichotomy.
- G The Note also identifies the SC, ST, OBC and the under-trial epidemic to highlight the requirement of : (a) institution of more effective mechanisms of speedy disposal of pending cases, (b) ensuring consistent enforcement of judicial decisions and (c) maintaining judicial oversight of operational legal aid services.

(iv) Action Plan k

The action plan for this scheme is divided into a three-pronged approach –

- the legal approach,
- data and digital measures
- a plan to raise awareness amongst all stakeholders.

The three approaches are detailed below.

I. LEGAL

- G Utilizing e-Seva Kendras which have been created under the aegis of the e-Committee of the Supreme Court, to enable litigants to obtain information about case status and to obtain copies of judgments and orders. These centers also extend assistance in e-filing of cases.
- G To make legal aid easily accessible to marginalized persons of all strata and geographical regions
- G To inter-link the operation of Legal Aid Cells in Law Colleges/Universities at a national level to enable quicker access to legal aid
- G Setting up of special courts to deliver speedy redressal of grievances related to caste-based atrocities

II. DATA-RELATED

- G Inclusion of data regarding cases dealing with caste-based atrocities in the National Judicial Data Grid
- G Text messaging services, social media, television, etc. may be used to share information about the POA, and including helpline numbers to members of the SC/ST communities
- G Ties with CSC e-Governance Services India Ltd (provides delivery of services to citizens using Common Service Centers)
- G Ties with Case Information System (allows a litigant to view case details online)
- G Ties with Unified Mobile Application for New-age Governance (UMANG) (single platform for access to pan India e-Gov services.)
- G Develop e-Payment methods for court and administrative fees.
- G Removal of Habitual Offenders lists based on caste, which is available online

III. AWARENESS

- G To nurture flexible responses on inputs from marginalized persons in distress pertaining to the obstacles faced by them and on specific issues for improvement.
- G Inclusion of the community (in the form of Law colleges, NGOs) in eradication of barriers to justice
- G Raising awareness regarding the protection afforded to members of the SC and ST communities under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 by way of governmental schemes
- G Increased representation of members of the marginalized groups in police and judicial forces
- G Seminars for awareness among authorities/stakeholders

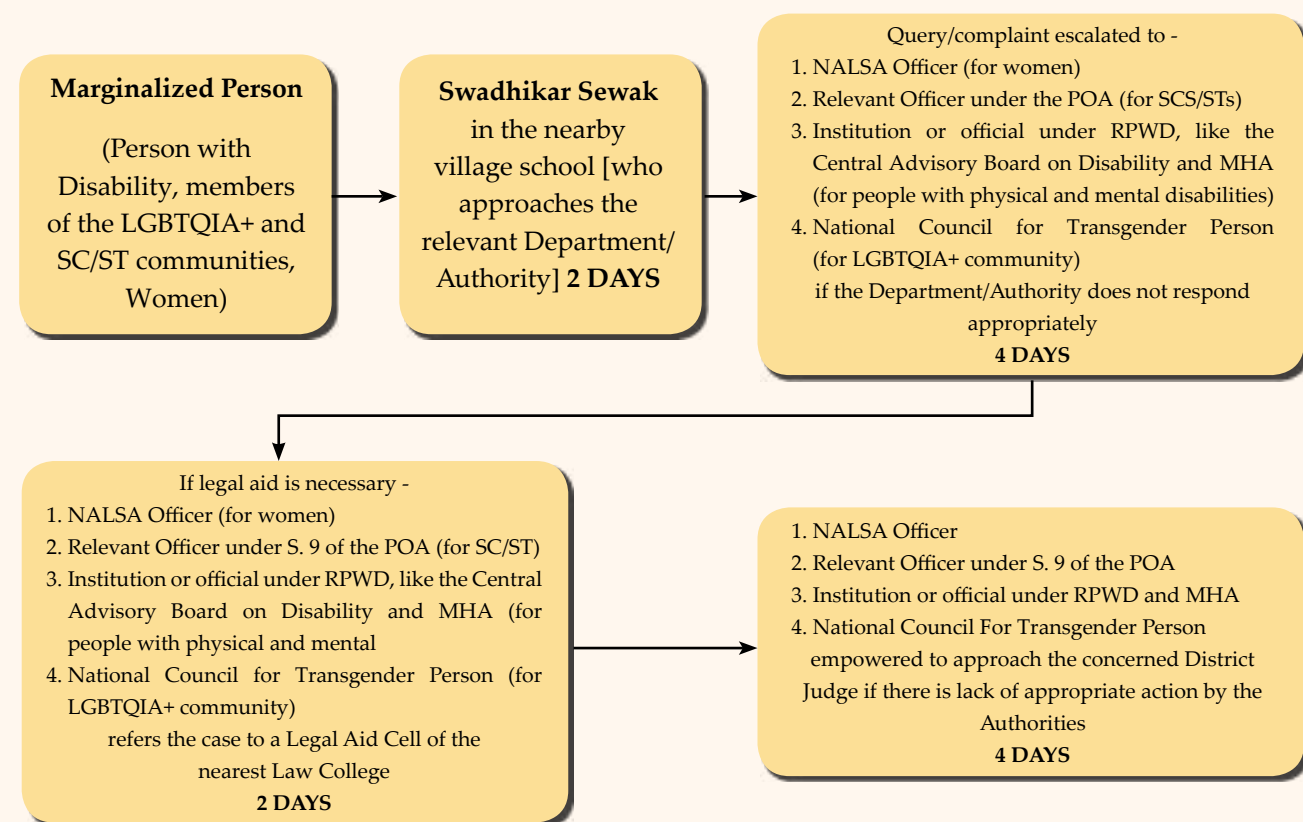
E. PROPOSAL OF THE SUB-COMMITTEE:

SWADHIKAR SEWA SCHEME

The sub-committee proposes to recommend the Swadhikar Sewa Scheme as an integrated scheme for the marginalised sections. Although the position of each of the marginalised segments, namely women, LGBTQ, disability and caste is unique and distinct

from each other in terms of their specific needs and the redressal mechanism recommended to suit the specific needs, the possible advantages of an integrated scheme were discussed by the members and a recommendation is being made on that basis.

The recommendation aims to preserve the uniqueness of each marginalised group in moulding the redressal mechanism according to their specific needs. The scheme may therefore be regarded as a work-in-progress and subject to further deliberation by stakeholders including on the intersectional framework spanning the identities of the four groups.



Recommendations for success of the Scheme

1. For Women and SC/ST communities

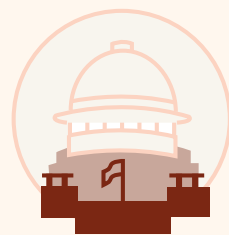
- G Addressing the issue of electronic records of habitual offenders based on caste or tribe
- G Conducting seminars for awareness
- G Connecting with NGOs
- G Special Courts with CIS software

2. For people with disabilities

- G Policies for inclusive development and accessibility need to consider the multiple forms of marginality like age, class, caste, sex, gender, location that disabled groups face. (Section 4 of the RPWD Act)

- G Procedural Access, Substantive Access, Promotional Access
 - G Physical Infrastructure, Personnel Infrastructure, Digital Infrastructure
 - G Communication Support
 - G Accessible Formats
 - G Courthouse Accessible Advisory Committees
 - G Disability Coordinator
 - G Disability Audit and Periodic Audit of Infrastructure
 - G NCRB Data on Disability
 - G Overcoming Attitudinal Barrier
 - G Accessibility in Peripheral Legal and Quasi-Judicial Authorities
 - G Judicial Performance Index
 - G Special Courts
3. For LGBTQIA+ community
- G Through print, electronic and social media make a public call to activists, students, organizations
 - G Identify collectives as representatives in each district
 - G Public announcements through social and print media for visibility
 - G Groups to interact with target audience and collect data
 - G Authenticate and collate collected data
 - G Draw inferences from collated data
 - G Develop an appreciation of the problem by discussion of collated data with experts, field activists and social researchers
 - G Disseminate the information amongst district judges, DSLA and group members

IV. UTILIZING THE SERVICES OF THE SC e-COMMITTEE



A. The Services

<p>e-Court services Mobile App v.2.0</p> <ul style="list-style-type: none"> • Citizen-centric service; benefits litigants, citizens, lawyers. • Information related to cases filed in the Subordinate courts and High Courts. • Cause list, case order, history of case available 24*7. • Manual for the app available in 14 languages 	<p>Indicative Notes</p> <ul style="list-style-type: none"> • Concise summary of landmark judgments in easy-to-understand format 	
<p>Vernacularisation of judgments and orders</p> <ul style="list-style-type: none"> • Availability of judgments in vernacular languages on the Supreme Court website. • Easily understandable by the stakeholders and interested parties. 	<p>National Judicial Data Grid</p> <ul style="list-style-type: none"> • Flagship project, ease of doing business initiative. • National repository of data relating to cases pending and disposed of. • Cases segregated on various parameters for easy access. 	<p>e-Payments</p> <ul style="list-style-type: none"> • Online payment of court-fee, fine, penalty and judicial deposits. • Payment portal integrated with state specific vendors.

The utilization of the e-Committee services would be essential for reaching the larger beneficiary and would also be beneficial when enabled to convey the grievances of the aggrieved persons to the relevant Departments/Authorities via an online portal/web-based application. An ICT Committee would be an integral part of this process by maintaining

such digital modes of communication and ensuring a smooth relay of information between the aggrieved persons and the concerned authorities. Further, they could also aid in the documentation of the case history of an aggrieved person, which could be used for perusal by the designated NALSA Officer in the scheme of plans recommended under this module. This committee could also ensure that all digital information generated in a particular case is treated with utmost confidentiality to safeguard the personal data of an aggrieved marginalised.

B. Looking Ahead

In the present scenario, the lack of awareness and invisible barriers constructed by various societal taboos, keep marginalized persons from accessing their rights. Besides the regulatory changes, there is a requirement for a “fundamental change in mindset”, wherein dispute resolution is to be seen not as a court where justice is administered, but as a service that is availed of. This would require faith to be reposed in the proposed Scheme by the marginalized persons which can be achieved only through active and transparent implementation. The following are certain suggestions which can be pursued to achieve this goal:

1. Establishing ties with CSC e-Governance Services India Limited

The Scheme may be benefitted by an association with CSC e-Governance Services India Limited, which is a special purpose vehicle, incorporated under the Companies Act, 1956 by the Ministry of Electronics and Information Technology, Government of India, to inter alia monitor the implementation of the Common Services Centers Scheme. It provides a centralized collaborative framework for the delivery of services to citizens through Common Services Centres (hereinafter “CSCs”). With the launching of the Common Services Centres 2.0, there has been for expansion of the self-sustaining CSC network to the Gram Panchayat level, by setting up more than 2.5 lakh CSCs, with at least one CSC in every Gram Panchayat. The Scheme can make use of the pre-existing and upcoming infrastructure of the CSCs to facilitate the communication between the beneficiaries and various governmental departments, and aid in a smooth grievance redressal mechanism.

2. Establishing ties with Case Information System

The Case Information System (hereinafter “CIS”) software is a giant move under the initiative of the E-Courts Mission Mode Project of the e-Committee of the Supreme Court. The whole idea of CIS, in a nutshell, is that the litigant should be able to view the daily status of his/her case, the orders of the case, the hearing date of his/her case, the progress of

the case on any particular date, etc., online. Any litigant who wants to file a case can directly go to the filing counter and file his/her case and will be given an acknowledgment slip with a CNR number and through the CNR number the litigant can track his/her case – whether it is taken on file or whether it is returned – and all the details can be got by him/her through an SMS or online in the comfort of their home. This revolutionizing feature has made Indian judiciary more litigant/user friendly, accessible and transparent.

3. Establishing ties with the Unified Mobile Application for New-age Governance (“UMANG”)

UMANG has been developed by the Ministry of Electronics and Information Technology and the National e-Governance Division to drive mobile governance in India. It provides a single platform for all Indian citizens to access pan India e-Gov services ranging from central to local government bodies and other citizen-centric services. This mobile application is integrated with e-Courts services, and has been launched for District and Subordinate courts. Within the ambit of this Scheme, utilisation of such an app could prove to be highly beneficial as it would make the various government services which an aggrieved marginalized person may want to avail of, and result in their grievance being resolved at the preliminary stage itself.

4. Utilization of the services of the e-SewaKendras

These services may be utilised to address concerns of marginalised persons in various areas including the following:

- G Obtaining caste certificates
- G Handling inquiries about case status, next date of hearing and other details.
- G To assist in online purchase of e-Stamp papers/e-Payments.
- G To help in applying and obtaining Aadhaar based digital signature.
- G Publicise and assist in downloading the Mobile App of e-Courts for Android and IOS.
- G Facilitate the booking of e-Mulakat appointments for meeting relatives in jail.
- G Guide people on how to avail of free legal services from the District Legal Service Authority, High Court Legal Service Committee and Supreme Court Legal Service Committee.
- G Explaining the method of arranging and holding a video conference court hearing.
- G Provide soft copies of judicial orders/judgments via email, WhatsApp or any other available mode

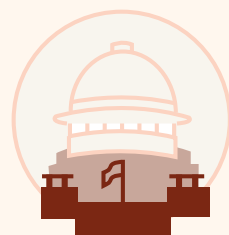
5. Developing systems for e-Payment

The E-Courts Mission Mode Project also envisages payments made through the platform of e-Pay. This has enabled the purchase of court fees and deposit of court fees through the ePayment portal. This is a secure banking transaction. Several other categories of deposits can be made through the e-payment portal. For example, maintenance in case of matrimonial disputes, disputed rent, compensation in an accident claim, compensation in land references and other deposits that a court may order. Similarly, fines and penalties in criminal cases can also be made through the ePayment portal. This makes it convenient for a litigant and also reduces footfalls in the overcrowded court complexes, which is vital in these times of the COVID-19 pandemic. The Scheme can utilise this platform in order to allow for e-payment of any administrative costs or fees which may be incurred in the process of addressing the grievances raised.

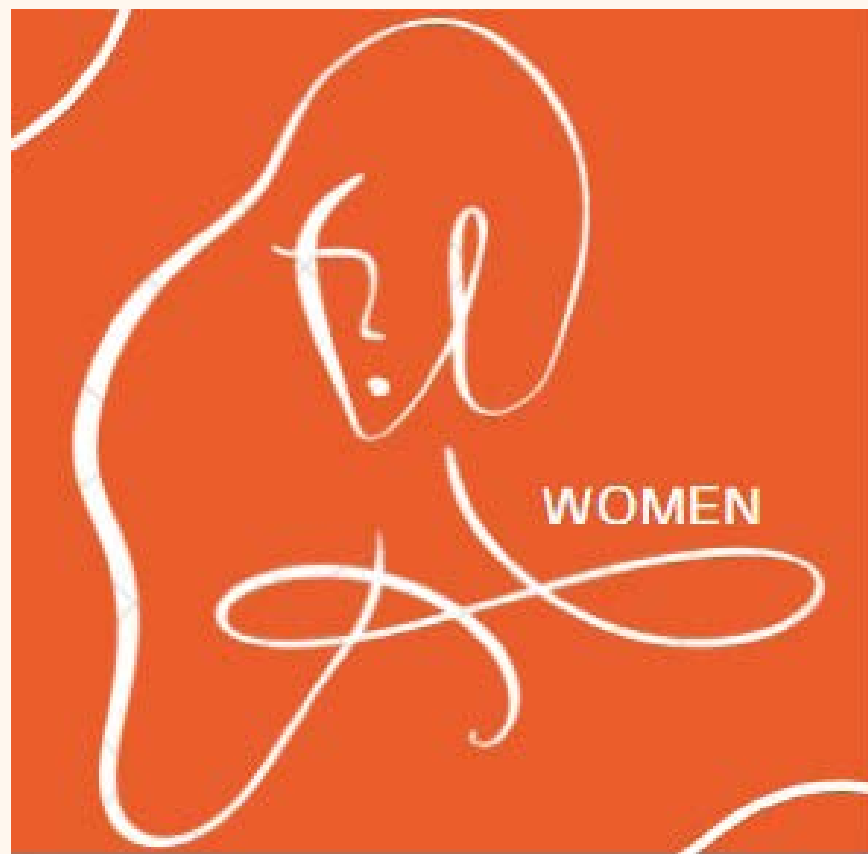
6. Inclusion of data in the National Judicial Data Grid

Data regarding the cases dealing with crimes/atrocities against marginalised persons, which are under trial, cases disposed of, conviction rates and the pendency percentages must be included in the National Judicial Data Grid. This would help in increasing accountability and having a clearer picture of the status of judicial remedies which were successfully availed by the said communities.

V. CONCEPT NOTES



A. WOMEN



1. Introduction and Objectives of the Scheme

- (i) A Constitution Bench of the Supreme Court has held that access to justice is a Fundamental Right guaranteed to citizens by Articles 14 and 21 of the Constitution of India.¹ Thus, it becomes essential to develop strategies that ensure access to justice for all, especially for the poor and marginalized sections of the society, who face a large

¹ Anita Kushwaha v. Pushap Sudan [Transfer Petition © No. 1343/2008, dated 19th July, 2016] - "We have; therefore, no hesitation in holding that access to justice is indeed a facet of right to life guaranteed under Article 21 of the Constitution. The Citizen's inability to access courts or any other adjudicatory mechanism provided for determination of rights and obligations is bound to result in denial of the guarantee contained in Article 14 both in relation to equality before law as well as equal protection of laws."

number of financial, socio-political, linguistic, logistical and geographical barriers in obtaining redressal of their grievances. Several marginalized groups deserve special focus and attention.

- (ii) The needs assessment study commissioned under the *GoI – UNDP Project on Access to Justice for the Marginalised People* has highlighted that majority of the respondents in 7 states did not even know about the existence of Legal Services Authorities.² Further, the lack of infrastructure, lack of adequate human resources, additional charge of Legal Services being given to sitting judges at the District and Taluka levels, and the need for improvements in selection, training and monitoring of empanelled lawyers are some of the systemic problems that affect the ability of the State Legal Services Authorities in fulfilling their mandate.³
- (iii) Women would constitute one of the biggest groups in the country which are marginalised. Empowerment of women results in empowering children, aged persons and society in general.
- (iv) Lack of information on basic legal rights and mechanisms of redressal is the biggest obstacle for women in their efforts to access justice. Communities discourage women from seeking help and the ones who dare, face stigma and marginalization within family and society. Although India's legal aid system is possibly one of the most extensive in the world, it has a limited reach - both in terms of awareness amongst the masses and the functionality of the existing framework.
- (v) The National Legal Services Authority (hereinafter "NALSA") was constituted under the Legal Services Authorities Act, 1987 to provide free Legal Services to the weaker sections of society. Section 12 of this Act enlists women and children as beneficiaries who are entitled to free legal services. Despite this, out of a total of 4.4 crore cases pending across India in various courts, the number of cases filed by women is a meagre 38 lakhs, as on 26th June, 2021.⁴ The total number of cases filed by women is 0.08 % - which is a dismal number, considering that they constitute nearly half of India's population.
- (vi) The following table gives the total number of cases filed by women and category-wise:

² Report of the Needs Assessment of Legal Services Authorities GoI-UNDP project on Access to Justice for Marginalised People- 2011-12

³ Increasing Access to Justice for Marginalised People - GoI – UNDP Project, available at https://doj.gov.in/sites/default/files/Increasing-A2J_0.pdf

⁴ National Judicial Data Grid, as available on <https://njdg.ecourts.gov.in/njdgnew/?p=main/index>

Particulars	Civil	Criminal	Total
Filed Cases By Woman* (District & taluk court)	1665994	1827270	3493264
Filed Cases by Woman (High courts of India)	24011	78388	318599
Total (pending cases)* (District & taluk court)	10397896	28619219	39017115
Total (pending cases) (High courts of India)	4166849	1674009	5840858

(Source: National Judicial Data Grid as on 26th June, 2021)⁵

- (vii) The judiciary has a critical role in ensuring equality and equal access to justice. The concept of 'Justice' has to change with changing times. It is not a static concept to merely connote dispensation of justice through the court system. Justice and access to justice have to be at the doorstep of the citizen. Access has to be provided at the grassroots level – which can only be done through community involvement and all-encompassing inclusive action.
- (viii) The outbreak of the COVID-19 pandemic has inadvertently pushed us in the direction of furthering this much-needed access to justice, as is witnessed in the robust functioning of virtual courts. The pandemic has also shown the legal system how ICT infrastructure can be utilised for ensuring access to justice.
- (ix) This increased access accorded to the citizens, owed to virtual courts, was also noted by Hon'ble Justice D.Y. Chandrachud in his address at the virtual inauguration ceremony for E-projects of the Kerala High Court. ⁶ He urged the use of advanced technology, including Artificial Intelligence to translate judgments of the High Courts into regional languages, thus "making the language of the courts available at the doorstep of the litigant."⁷
- (x) Such digital access to courts, more so in regional languages, would aid in breaking down linguistic and societal barriers which keep women from having their voices heard.
- (xi) Online Dispute Resolution (*hereinafter* "ODR") is another tool that could be employed to further this cause, given that the courts are becoming digitized through the efforts of the judiciary. Hon'ble Justice D.Y. Chandrachud laid down certain parameters within which ODR may be developed in a seminal meeting, organised by the NITI Aayog, in association with Agami and Omidyar Network India. These parameters include the

⁵ Id.

⁶ Virtual courts are citizen centric, says SC judge, Outlook – The News Scroll, 15 June, 2020, available at <https://www.outlookindia.com/newscroll/virtual-courts-are-citizen-centric-says-sc-judge/1866958>

⁷ Id.

usage of technology to promote user confidence in the process, incorporation of elements of design thinking to understand user needs for an ODR platform and employment of data management tools to ensure predictability, consistency, transparency, and efficiency of the judicial process.

2. 'STRI –SEWA' - Opening new frontiers:

This spirit of streamlining the remedies available to women, in a manner that is mindful of the roadblocks specifically faced by this section of society, forms the backdrop of the Stri - Sewa Scheme. The Stri - Sewa Scheme (*hereinafter* "the Scheme") would aim to reach out to its target group i.e., women of all socio-economic backgrounds to provide a one-stop platform for redressal and resolution of their grievances. The objectives of the Scheme would be manifold, including:

- G To establish a mechanism for redressal of grievances relating to availing of essential services and government schemes for women and to enable women to access them better.
- G To effectively use Information Communication Technology (*hereinafter* "ICT") infrastructure in providing different services
- G To eliminate red-tapism and delays in approaching different Departments/ Authorities
- G To make legal aid easily accessible to women of all strata and geographical regions
- G To inter-link the operation of Legal Aid Cells in Law Colleges/Universities at a national level to enable quicker access to legal aid
- G To empower women through legal literacy and thereby facilitate access to justice
- G To nurture flexible responses on inputs from women in distress on the obstacles faced by them and on specific issues for improvement.

The following table compares the current system with the system proposed under the Scheme:

Current System	Stri-Sewa Scheme
G Legal Aid is available at the National, State and District level	G Facilitation & Resolution system of grievances at the doorstep of women
G It is voluntary	G Window to facilitate all daily needed services
G Those who request can get the aid – funds + lawyers, etc.,	G If services are not provided, then expedited resolution
	G Convergence with ICT for everyday needs of women

3. Services and Procedural Operations of the Scheme

3.1 Setting up of Stri-Booths

The Scheme will involve setting up of 'Stri-Booths' in the local villages of each District in the country. The Stri-Booths will ideally be located in the village school, which could be done in consultation with the list of polling stations in the country set up by the Election Commission of India. This would be an appropriate point of contact since, as of February, 2020, there are 10,35,919 polling stations, where basic infrastructure facilities already exist, for the Scheme.

3.2 Stri-Sakhi in Stri-Booths

Each Stri-Booth will have a female Stri-Sewa officer called a 'Stri Sakhi', who may be a teacher in the local government school/college and would be the point of contact for any grievances of the local women of the concerned area.

Stri Sakhis will be provided with a computer and internet connection. ICT infrastructure will also be provided to the Stri Sakhi by an ICT Committee in the form of an online portal/web-based application, which would enable the Stri Sakhi to contact the concerned Departments/Authorities to redress the queries/complaints received from the aggrieved women. The Stri Sakhi shall do so, within 2 working days from receiving the grievance.

3.3 Role of the NALSA Officer:

All Stri Sakhis of the District will be supervised by a designated NALSA Officer. If any grievance is not redressed by the Department/Authority within 4 days, the Stri Sakhi shall escalate the grievance to the NALSA Officer, who will investigate the matter with the concerned Department/Authority. The NALSA Officer shall suo-motu keep a periodical record of the grievances that are received by the Stri Sakhis and the achieved redressal rate.

3.4 Role of the District Judge

In case of lack of appropriate action/redressal of the grievance, the NALSA Officer will be empowered to approach the concerned District Judge. The District Judge shall investigate the matter and in appropriate cases, refer the matter to a designated ADR facility attached to the Court. This could then further be facilitated by ODR, taking the scope of

ODR, beyond just small and medium-value cases.⁸ For this, the Scheme must envisage the usage of digital technology along with techniques of alternate dispute resolution such as negotiation, mediation, and arbitration.

3.5 Role of Legal Aid Cells of Law Colleges and Universities

Another stakeholder in the process will be the Legal Aid Cells of the nearest law colleges and universities, whose details shall be available with the Stri Sakhi for providing legal aid services to the women, in consultation with the NALSA Officer. A system of credits could be developed on a national level to encourage students to participate as volunteers in the Scheme and contribute to actual community development. Further, a mechanism for such credits to be counted towards mandatory credit requirements for completion of a legal degree could be developed as an added incentive for the students to participate in facilitating legal aid services. Tangentially, mechanisms may also be developed to ensure that the time spent by the students in contributing to legal aid services must be included while calculating attendance requirements if any.

3.6 Role of the ICT Committee

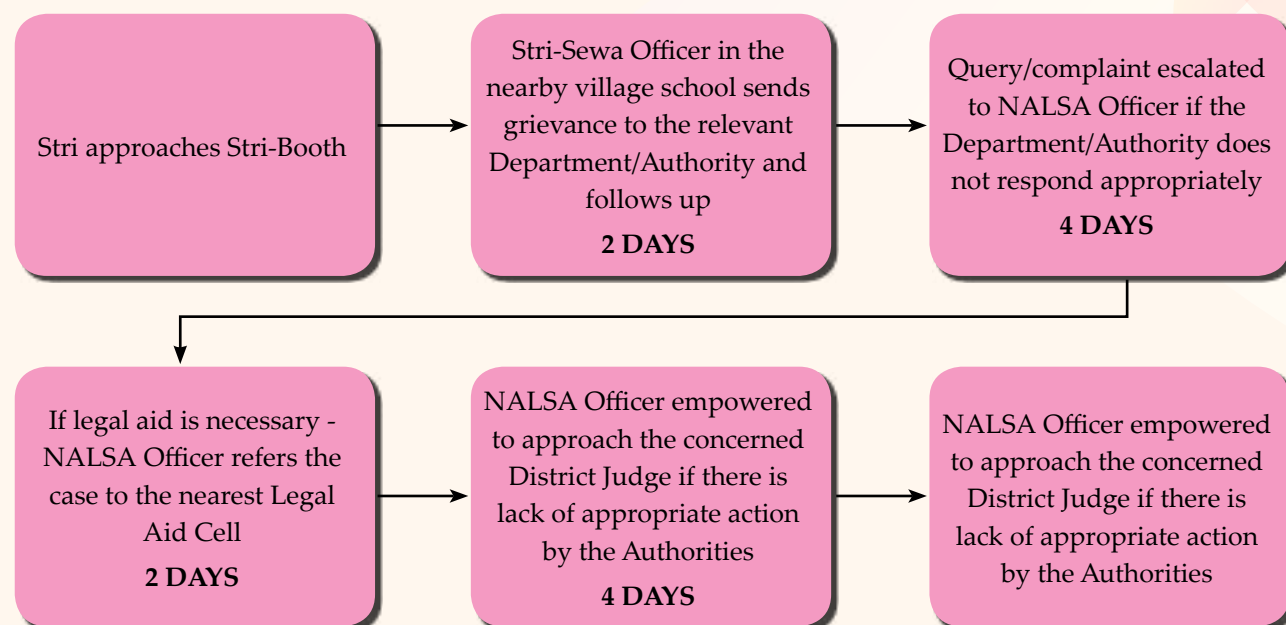
The Stri Sakhi would be enabled to convey the grievances of the aggrieved women to the relevant Departments/Authorities via an online portal/web-based application. An ICT Committee would be an integral part of this process, by maintaining such digital modes of communication and ensuring a smooth relay of information between the Stri Sakhi and the concerned authorities. Further, they could also aid in the documentation of the case history of an aggrieved woman, which could be used for perusal by the designated NALSA Officer. This committee could also ensure that all digital information generated in a particular case is treated with utmost confidentiality to safeguard the personal data of an aggrieved woman approaching the Stri-Booth.

3.7 A tracking mechanism to monitor grievances raised

At all stages of the process, the aggrieved woman will be kept updated through a tracking mechanism for the grievance raised on the portal, which is available with the Stri Sakhi. The total period within which all such grievances will be resolved will be 15 days from the date of initiation of the query/complaint process.

⁸ Catalyzing Online Dispute Resolution In India, NITI Aayog, Agami and Omidyar Network India, June 12, 2020, available at <https://niti.gov.in/catalyzing-online-dispute-resolution-india#p2>

Flowchart of roles and responsibilities of stakeholders



3.8 Evaluation

The functioning of the Stri-Booths in pilot districts would be assessed after six months of their operation, after which the ICT Committee will move the proposal for expansion of the project to cover more districts. Mapping exercise, baseline survey, action research conducted by the NALSA in this regard will help in assessing the impact or outcome of the Scheme.

4. The Way Forward

4.1 Increasing awareness amongst the relevant stakeholders

There has been an expansion of the idea of mobile courts in the Madras High Court, wherein the possibility of vans with computers and Internet connectivity to remote villages in Tamil Nadu for people to take part in judicial proceedings virtually without having to travel to different courts is being considered.⁹ A mobile court was conducted in the Thirumalairayasamuthiram panchayat, consisting of 19 villages, and the proceedings of 13 admission cases falling under the jurisdiction of the judicial magistrate-I were held through that virtual court.¹⁰ This has been seen to increase access to justice and bring the same to the doorstep of the litigants.

On similar lines, information regarding various remedies available to women must be brought within their reach. For this, a model similar to the one set up under the Access to Justice for Marginalized People Project of the United Nations Development Programme

⁹ Taking justice to the doorsteps of litigants, Mohammed Imranullah S., The Hindu, July 17, 2020, available at <https://www.thehindu.com/news/national/tamil-nadu/taking-justice-to-the-doorsteps-of-litigants/article32107351.ece>

¹⁰ Id

and the Department of Justice may be considered which has kiosks, which are installed primarily in the District Legal Services Authority premises, that provide information on legal rights to users.¹¹ This can also be done by engaging the legal aid centers in law colleges and universities, wherein the students are incentivised to promote legal awareness in remote areas.

4.2 Stri Sakhis acting as a link between different bodies

Stri Sakhis could, in the future, act as a link between the Women's Cell in Police Stations, the National Commission for Women and other such bodies to deal with more serious cases of violence against women, including rape, domestic violence, sexual harassment, etc.

B. LGBTQIA+



¹¹ Access to Justice for Marginalised Persons Evaluation and Documentation, UNDP and Department of Justice, Final Report, 18 th May, 2017, available at https://doj.gov.in/sites/default/files/UNDP%20Final%20report_18May2017.pdf

P.R.I.D.E.

Promote, Respect, Include, Dignify, Empathise

Marginalisation based on both sexuality and gender has been a part of society and state. Through making references to both the legal and policy question, this note addresses ideas of recognition and inclusion of the LGBTQIA+ community.

This note is a work in progress in identifying the beneficiary and seeks to build an action-oriented report which recognises strategies and tools to ensure engagement, identification and redressal of problems.

Parts I, II and III consider questions of recognition and areas of interventions in identifying strategies. Part IV and V create action plans for addressing the methods of recognition through the creation of a network of agents of change as well as through awareness.

1. What is LGBTQIA+?

1.1 Identification:

The LGBTQIA+ community consists of both sexual and gender minorities. The acronym LGBTQIA is expanded as:

- L: Lesbian
- G: Gay
- B: Bisexual
- T: Transgender
- Q: Queer
- I: Intersex
- A: Asexual

The first step in this case, for identifying the beneficiary, could be to begin with a list of classes of people who fall within identifiable heads of the spectrum. Even until the last decade, people were only aware of four letters relating to various sexual and gender minorities i.e., L, G, B, and T. However, the term LGBT has been adding new letters with time, representing both evolution and inclusion. Therefore, the '+' sign came to be added as a suffix to include everything on the gender and sexuality spectrum. In a sense, therefore, the gender and sexuality spectrum are an inclusive list.

1.2 A preliminary look at the various terms

The various terms that make the community¹² could be as follows:

- G Gay and Lesbian – Term used to represent males who are attracted to males; and females who are attracted to females in an erotic and/or emotional sense.
- G Transgender – The term trans* has been adopted by some groups as a more inclusive alternative to “transgender”, where trans (without the asterisk) has been used to describe trans men and trans women, while trans* covers all non-cisgender identities, including transgender, transsexual, transvestite, genderqueer, genderfluid, non-binary, etc.
- G Bisexual – Someone who is attracted to people of their gender or other gender identities.
- G Pansexual – Someone who is attracted to people of all gender identities, or someone who is attracted to a person’s qualities notwithstanding their gender identity.
- G Queer – A term used for an individual whose sexual orientation is not heterosexual. Falling within the spectrum, these individuals find gender identity and sexuality to be fluid and not affixed to one identity.
- G Asexual – Someone who experiences little or no sexual attraction.
- G Demisexual – Someone who generally does not experience sexual attraction unless they form a strong emotional connection with someone.
- G Graysexual – Someone who usually does not experience sexual attraction but occasionally does.
- G Cisgender – Someone whose identity matches the sex assigned to them at birth.
- G Transgender – A broad term for those whose gender identity does not match with the sex assigned to them at birth.
- G Gender fluid – Term for someone whose identity shifts or fluctuates. Such person may identify themselves as more masculine someday, and more feminine on others.

It may, however, be mentioned that the acronym has been criticised by various members of the community itself on the lines that the initialisms LGBT or GLBT are not agreed to by everyone that they encompass. For example, some argue that transgender and transsexual causes are not the same as that of lesbian, gay, and bisexual (LGB) people. This argument centers on the idea that being transgender or transsexual has to do more with gender identity, or a person’s understanding of being or not being a man or a woman irrespective of their sexual orientation. LGB issues can be seen as a matter of sexual orientation or attraction.

¹² Michael Gold, ‘The ABCs of L.G.B.T.Q.I.A.+’ The New York Times (21 June 2018) <https://www.nytimes.com/2018/06/21/style/lgbtq-gender-language.html> accessed 7 January 2021

These distinctions have been made in the context of political action in which LGB goals, such as same-sex marriage legislation and human rights work (which may not include transgender and intersex people), may be perceived to be different from transgender and transsexual goals.¹³

2. Communication with Organisations and Stakeholders:

2.1 Ideas for Communication

In order to recognise the beneficiary, the first necessary tool is communication with the people of the community. Stakeholders must be identified, and this must be followed up with policies and processes that are inclusive and engage directly with beneficiaries. These strategies follow a mix of communication with civil society groups, state constituted bodies, along with understanding the predicaments of industry. Various reformative steps can be taken up by the administrative bodies, which are:

- G Communication could be conducted by way of seminars and in the current situation, through webinars allowing speakers to represent the community. With an emphasis on field reports of the marginalized communities (like literacy, living conditions, job opportunities, etc.)
- G Outreach programs with civil society groups and NGOs.
- G Surveys encompassing issues on sexual self-identification with data protection and strict confidentiality. Such questions have been included in the nationally representative surveys conducted by government departments.¹⁴
- G Bodies such as the West Bengal Transgender Development Board including other development authorities of different states and the child social welfare departments may be tasked with protecting their identities.
- G Communicating with bodies such as the Association of Transgender/Hijras of Bengal (ATHB) and the National Council for Transgender Persons, the latter has been established under the newly passed statute on Transgenders¹⁵.

For the process of recognition, it could be interesting to understand how industries/corporate organizations see matters of inclusion.¹⁶

¹³ LGBT (Wikipedia, 7 January, 2021) <https://en.wikipedia.org/wiki/LGBT> accessed on 11 January, 2021

¹⁴ Organisation for Economic Co-operation and Development, The LGBT challenge: How to better include sexual and gender minorities? (OECD iLibrary, 27 March 2019) <https://www.oecd-ilibrary.org/sites/c64c3d3f-en/index.html?itemId=/content/component/c64c3d3f-en> accessed 10 January 2021

¹⁵ The Transgender Persons' (Protection of Rights) Act 2019

¹⁶ Divya J. Shekhar, 'India INclusive: LGBTQ+ inclusion at the workplace still a work-in-progress' Forbes India (7 September 2020) <https://www.forbesindia.com/article/real-issue/india-inclusive-lgbtq+-inclusion-at-the-workplace-still-a-workinprogress/62365/1> accessed 7 January 2021

2.2 The Corporate Viewpoint:

Some organizations began the journey after the 2009 Delhi High Court judgment, *Naz Foundation v. Govt. of NCT of Delhi*¹⁷ which ruled that Section 377 of the Indian Penal Code is unconstitutional. In this judgment, the Court located the rights to dignity and privacy within the right to life and liberty guaranteed by Article 21 under the fundamental right to freedom of the Constitution and held that criminalization of consensual gay sex violated these rights. The Historic Supreme Court verdict on September 6, 2018, upholding the rights of LGBTQ+ individuals, freed the fence-sitting companies.

*Navtej Singh Johar v. Union of India*¹⁸ was a landmark judgment, decriminalizing Section 377 of the Indian Penal Code to the extent of consensual sexual relations between adults of the same sex. The judgment was delivered by a five-judge bench of the Supreme Court of India comprising of the then Chief Justice of India Justice Dipak Misra, Justices R. F. Nariman, D. Y. Chandrachud, A. M. Khanwilkar and Indu Malhotra. The Court ruled that consensual adult gay sex is not a crime.

Accenture India was the first to introduce medical cover for gender reassignment surgery in 2016. Lakshmi C, Managing Director at Accenture India says the company has invested in building programs to attract, retain and grow a diverse workforce, sensitize leaders through sessions and make efforts to enroll more people who can be allies to LGBTQ+ employees. They have also started a six-month internship program to build a skilled pool of transgender candidates. Infosys has hired LGBTQ+ members across roles and hierarchies, including software engineers, project managers, designing and communication experts. The iPride employee resource group (ERG) has introduced gender-neutral washrooms across their India campuses, created learning resources for awareness, facilitated sharing of personal stories through the Infosys TV and intranet, and institutionalized health policies which includes partner coverage for medical insurance, gender confirmation surgeries, surrogacy and egg freezing and mental health.

Tony Tania Christopher, while working for Infosys came out as gay in 2016, after many years of pretending to be straight. A progressive inclusion cell was one of the biggest reasons for him to stick with the company for over five years, says the 35-year-old Bengaluru resident. Coming out boosted his self-confidence and increased his workplace productivity, Christopher explains.

¹⁷ (2009) SCC Online Del 1762

¹⁸ (2018) 10 SCC 1

Looking at the cases above and the perspective of some of the most reputed India Companies we can see the different ways they have adapted to make the LGBTQ+ community inclusive in the workplace. This, however, still has a long way to go in terms of sensitizing people and the workplace.

Case Study

LGBTQ community battling prejudice two years after the annulment of Article 377,¹⁹

Case 1:

Singh vividly remembers September 6, 2018, the day he says his life changed.

Two years ago, on this day, the Supreme Court had struck down the draconian Article 377 that criminalised gay sex. The same day Mr. Singh told his parents about his sexual orientation.

“I think having that in the back of my mind that even the apex court of the country believes I am not a criminal gave me the confidence to come out of the closet and explain my sexual orientation to my parents,” he said.

Two years on, Mr. Singh says he now considers that date as his second birthday when he was born again as an individual who was more free, confident and relaxed.

“It was the first step but I do think the time for the next step has come now. The inequality still blatantly exists in society’s mindset towards us whether it is in terms of inheritance laws or surrogacy laws - there is still a long, long road ahead of us,” Mr. Singh, the techie from Mumbai, said.

Case 2:

But Sunaina (name changed), an interior designer, says her life has not changed much since the verdict.

“The reason I can’t publicly identify myself is itself proof that acceptance from society is difficult. I belong to a middle-class family where even discussion over the subject of homosexuality is forbidden. Let alone coming out to my parents about being one. The verdict did good to us though. We are at least not considered criminals anymore but the mindset of the society is still the same,” she said.

Case 3:

The Supreme Court, in a landmark judgment on September 6, 2018, unanimously struck down part of Section 377 of the Indian Penal Code (IPC) which criminalised gay sex, saying that it violated the constitutional right to equality and dignity.

Section 377 declared “carnal intercourse against the order of nature” punishable by imprisonment for life.

The judgment was widely welcomed by most sections of society, especially the youth who called it a victory of love.

Case 4:

Both Singh and Sunaina say they remember celebrating that whole night two years ago even though they constantly were thinking about “what’s next?”

Shubhankar Chakravorty, a Bengaluru-based writer, says the next move should be to extend the same civil rights to the LGBT population that the straight population enjoys.

“LGBT people are too taxpaying, law-abiding citizens, they have every right to the same privileges,” he said.

“Things have surely changed. LGBT people are now more confident to express themselves, grow personally, and own their relationships without the fear of discrimination and harassment. However, this change has primarily been for the urban, privileged few. Also, the lives of transgender people have not improved much,” Mr. Chakravorty said.

Case 5:

Bittu Kondaiah, a trans-man, agrees with Chakravorty that the SC verdict did not do much for the transgender community.

“But it did ensure that there was one lesser section (of gay community) to get targeted by society. The mindset that the LGBT (lesbian, gay, bisexual and transgender) community can be easily exploited as they have no one who cares about them, that mindset has changed,” he said.

Case 6:

Anjali Gopalan, a member of Naz Foundation, an NGO that has been at the forefront of the battle against Section 377, said the community has become a lot stronger since the verdict but there are more rights that it needs to be given.

¹⁹ Press Trust of India, ‘Two years since Article 377 annulment, LGBTQ community still battling prejudice’ The Hindu (6 September 2018) <https://www.thehindu.com/news/national/two-years-since-article-377-annulment-lgbtq-community-still-battling-prejudice/article32534479.ece> accessed 10 January 2021

“The LGBT community does not have any rights per se which society takes for granted like the right to marriage, inheritance so these are rights that should be there for everyone in society. Unfortunately, the LGBT community has been left out of it and that is something that needs to happen,” she said.

Case 7:

Tripti Tandon, lawyer and deputy director of Lawyers Collective, said it has been seen that the judgment gave many from the LGBT community the confidence to live their lives on their terms.

“But unfortunately, society still has not changed its mindset and that is the reason why the community members who take such steps of staying with their partners face a lot of violence and hostility and harassment from their parents,” Ms. Tandon, who was among the members of the team to fight the case in the apex court, said.

“The government needs to step in. The government hasn’t done anything. If the government were to take some steps, then the message would go out very clearly in society that these relationships are not to be looked down upon,” she added.

Divya Dureja, a counselling psychologist and LGBTQIA+ wellness advocate, said there are still inadequacies in the “free and fair rights” of the LGBTQ community members.

“When will the state begin to recognize non-heterosexual unions? How do we address the homelessness, bullying, violence, workplace discrimination still being faced by the members of the LGBTQ community and how can you give support to queer population drowning in mental health conditions,” she asked.

She said even though the gay community has found some respite from being targeted now that Section 377 has been struck down, crimes and harassment against trans folks and lesbians continue under the present laws.

Akhila Sivadas, the managing trustee and executive director of the Centre for Advocacy and Research (CFAR), a non-profit organization said while the significance of this ruling to decriminalize homosexuality cannot be reduced, the process of social inclusion and acceptance now assumes even greater importance.

3. Recognition within the Legal Realm

The Transgender Persons’ (Protection of Rights) Act 2019

- G The Bill was in contemplation within the parliament since 2016 and has taken a form that is not welcomed by transgender activists ²⁰.
- G The first aspect that the bill seeks to cover is discrimination, yet this is done through no means of explicitly defining what constitutes discrimination against the transgender community even if it highlights the arenas where discrimination will be prohibited.
- G The important provisions of the Act are:
 - **Definition of a transgender person (Section 1):** The Bill defines a transgender person as one whose gender does not match the gender assigned at birth. It includes trans-men and trans-women, persons with intersex variations, gender-queers, and persons with socio-cultural identities, such as kinnar and hijra. Intersex variations are defined to mean a person who at birth shows variation in his or her primary sexual characteristics, external genitalia, chromosomes, or hormones from the normative standard of a male or female body.
 - **Prohibition against discrimination (Section 3):** The Bill prohibits discrimination against a transgender person, including denial of service or unfair treatment in relation to: (i) education; (ii) employment; (iii) healthcare; (iv) access to, or enjoyment of goods, facilities, opportunities available to the public; (v) right to movement; (vi) right to reside, rent, or otherwise occupy property; (vii) opportunity to hold public or private office; and (viii) access to a government or private establishment in whose care or custody a transgender person is.
 - **Right of residence (Section 13):** Every transgender person shall have a right to reside and be included in his household. If the immediate family is unable to care for the transgender person, the person may be placed in a rehabilitation centre, on the orders of a competent court.
 - **Employment (Section 13):** No government or private entity can discriminate against a transgender person in employment matters, including recruitment, and promotion. Every establishment is required to designate a person to be

²⁰ Vijayta Lalwani, ‘Explainer: Despite criticism, the Transgender Persons Bill was just passed. What’s next?’ (Scroll.in, 27 November 2019)

a complaint officer to deal with complaints about the Act.

- **Education (Section 13):** Educational institutions funded or recognised by the relevant government shall provide inclusive education, sports and recreational facilities for transgender persons, without discrimination.
- **Health care:** The government must take steps to provide healthcare facilities to transgender persons including separate HIV surveillance centres, and sex reassignment surgeries. The government shall review the medical curriculum to address the health issues of transgender persons, and provide comprehensive medical insurance schemes for them.
- **Certificate of identity for a transgender person (Section 4):** A transgender person may make an application to the District Magistrate for a certificate of identity, indicating the gender as 'transgender'. A revised certificate may be obtained only if the individual undergoes surgery to change their gender either as a male or a female.
- **Welfare measures by the government (Section 8):** The Bill states that the relevant government will take measures to ensure the full inclusion and participation of transgender persons in society. It must also take steps for their rescue and rehabilitation, vocational training and self-employment, create schemes that are transgender sensitive, and promote their participation in cultural activities.
- **Offences and penalties:** The Bill recognizes the following offences against transgender persons: (i) forced or bonded labour (excluding compulsory government service for public purposes), (ii) denial of use of public places, (iii) removal from household, and village, (iv) physical, sexual, verbal, emotional or economic abuse. Penalties for these offences vary between six months and two years, and a fine.
- **National Council for Transgender persons (NCT):** The NCT will consist of: (i) Union Minister for Social Justice (Chairperson); (ii) Minister of State for Social Justice (Vice-Chairperson); (iii) Secretary of the Ministry of Social Justice; (iv) one representative from ministries including Health, Home Affairs, and Human Resources Development. Other members include representatives of the NITI Aayog and the National Human Rights

Commission. State governments will also be represented. The Council will also consist of five members from the transgender community and five experts from non-governmental organisations.

- The Council will advise the central government as well as monitor the impact of policies, legislation and projects concerning transgender persons. It will also redress the grievances of transgender persons.

National Legal Services Authority (NALSA) v. Union of India AIR 2014 SC 1863; (Bench of Justices K.S. Radhakrishnan and A.K. Sikri)

- G Article 14 guarantees equality to 'any person' which means man, woman, and transgender; as such are guaranteed equal protection of the law. Transgenders have equal rights in employment, healthcare, education and civil rights. Discrimination on the ground of sexual orientation represents inequality before the law and violates Article 14.
- G Identification of the third gender is the first right amongst other rights that need to be secured. Welfare laws and other constitutional rights count for nothing without identification and recognition of the marginalized community. Identifying sexual and gender minorities is also important since they face challenges in accessing healthcare systems due to discrimination.
- G Giving purposive interpretation to Constitutional provisions to include transgender rights (Para 127).
- G Stressing on gender-neutral terms used in Constitutional provisions like Art. 14, Art. 19 (Paras 61, 82, and 135)
- G The marginalized communities can derive benefits under Art. 15 (4) and Art. 16 (4) since they were denied rights under Art. 15 (2) and Art. 16 (2) respectively (Paras 66, 67, and 135.3).

Navtej Singh Johar v. Union of India (2018) 10 SCC 1

- G Navtej Singh Johar is the seminal judgment that decriminalized homosexuality in India. This judgment delivered by the Supreme Court of India is a result of multiple Public Interest Litigations that had been filed by different groups of the LGBTQIA+ community.

- G The Bench struck down Section 377 to the extent that it criminalized sex between two consenting adults. The Court upheld the part of the provision that criminalizes non-consensual acts with children or animals.
- G The Supreme Court further held that Section 377 violates Articles 14, 15, 16 and 19 (1) (a) of the Constitution of India. It recognized that every individual irrespective of their gender identity and sexual orientation have the right to live with dignity, autonomy and make personal and private choices without State interference.

4. Access to Justice:

“Indian citizens belonging to sexual minorities have waited. They have waited and watched as their fellow citizens were freed from the British yoke while their fundamental freedoms remained restrained under an antiquated and anachronistic colonial-era law – forcing them to live in hiding, in fear, and as second-class citizens. In seeking an adjudication of the validity of Section 377, these citizens urge that the acts which the provision makes culpable should be decriminalised. But this case involves much more than merely decriminalising certain conduct which has been prescribed by a colonial law. The case is about an aspiration to realise constitutional rights. It is about a right that every human being has, to live with dignity. It is about enabling these citizens to realise the worth of equal citizenship. Above all, our decision will speak to the transformative power of the Constitution. For it is in the transformation of society that the Constitution seeks to assure the values of a just, humane and compassionate existence to all her citizens.” - *Justice D.Y. Chandrachud in Navtej Singh Johar v. Union of India (2018) 10 SCC 1*

The decriminalisation of Section 377 was a visible marker in the history of queer movement in India. However, to make the effect of the judgment felt and make it larger than a mere symbol of emancipation - various facets of the legal interpretation as it exists can be made accessible to challenge heteronormativity. A gamut of strategies exists within and beyond the state which makes identities visible and challenges legal perceptions through the law.

Criminal Justice Reforms

Criminalisation of any adult consensual relationships or sexual acts is read as against the Constitution. This should, in turn, be extended to statutory interpretation and understanding that criminalisation of these acts would mean denial of identity and agency by the court.

Criminal law reforms are complex and would require extensive research in undertaking how queer individuals could be made inclusive because it is not just a question of changing substantive provisions but also procedural ones. Further, gender-neutral laws in sexual offences are also another complex realm wherein social hierarchy of power relationship is enmeshed with sexual acts of violence.

Anti-Discrimination and Horizontal Application

There is a dire need for anti-discrimination statutes within workplaces that would ensure upliftment of various identities - not just in line with the state but also private institutions.

On assessment of the nature of discrimination, wherever possible, horizontal application of constitutional provisions should be made in order to protect the marginalized on the gender spectrum.

Access to Justice

Liberal Interpretation of Existing Statutes

Liberal interpretation of statutes to include all genders into the realm of the provision that provides protection to the rights of the individuals. Refer: Calcutta HC judgment in **Malabika Bhattacharjee vs. Internal Complaints Committee, Vivekanand College**; J. Sabyasachi Bhattacharya held “Sexual harassment as contemplated in the 2013 Act [Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013], has to pertain to the dignity of a person, which relates to her/his gender and sexuality; which does not mean that any person of the same-gender cannot hurt the modesty or dignity as envisaged by the 2013 Act.”

Anti-Discrimination and Horizontal Application

Provisions for Online Dispute Resolution: To protect the community from facing the discrimination as they do on having to come to courts, an online dispute resolution forum may be provided for.

Access to justice through mediation: Since conventional laws do not adequately address various issues concerning the LGBTQIA+ community, LGBTQIA+ specific mediation may prove to be helpful. It would reduce the possibility of settlements being made on heterosexual settlement precedents. It may include mediators who identify themselves as LGBTQIA+.

“You don’t have to like me to respect my rights
I don’t have to agree with you to uphold your rights
You don’t have to be like me, for me to protect your rights”

- Kate Gilmore, Deputy Commissioner of Human Rights of the United Nations.

The sensitivity of the judge is a central aspect in crafting remedies for the queer community. Recognition is an important aspect of social justice - however, this recognition is a slippery slope when it comes to the identification of the social group.

The spectrum of the community is defined and fluid at the same time and there is hence a need for the judge to be informed with an inclusive mindset.

► **Anti- Discrimination Laws and the need for Affirmative Action**

The Madras High Court judgment of 7th June, 2021; S. Sushama vs. Commissioner of Police; is an instance of judicial engagement in the sensitisation aspect. Articles published in several newspapers following the decision highlighted the significance of ‘unlearning of prejudice’ with regard to the LGBTQIA community and training for judges, teachers, prison officials and law enforcement agencies.

Some headway: In 2017 Joyita Mondal was appointed as the first transgender judge in a Lok Adalat in Uttar Dinajpur, West Bengal followed by other appointments such as Vidya Kamble in Maharashtra and Bidhan Barua in Assam in 2018. In June of 2021, the Odisha Government allowed the transgender community to apply for the posts of constables and sub-inspectors in the State Police Department.

- G Addressing negative attitudes by law enforcement agencies, denial of healthcare, mental health issues arising out of harassment.
- G Ensuring integration in the spheres of employment and education through reservations.
- G Integration of children of trans-genders in mainstream schools.
- G Expanding the curriculum in schools by including studies relating to the third gender and other LGBTQs.

G Kerala has recently implemented a scheme to provide Rs. 1,000/month to students in 7th grade and above if they identify as transgender. Statistics indicate that transgender students are much more likely to not complete their schooling.²¹

G Facilitate inclusion in the workplace and conduct workshops for sensitization of employees for encouraging diversity in sexual orientations and identities.

G National Human Rights Commission’s 2017 study on the rights of transgender had found that only 2% of transgender children stay with their parents while the rest are abandoned. To prevent such a scenario, there can be a regular check-in from a Transgender Board official. Steps to provide equal housing facilities for transgender and intersex individuals.

► **Questions of Criminal Justice**

G Harassment of queer individuals by police is known to occur often and has been reported in Kolkata.²² Sensitization of police officials on interactions with LGBT individuals to treat them with dignity and not cause undue harassment.

G Laws relating to children must also accommodate transgender children. The suffering of adult transgenders is another area that needs intervention. As per the 2011 census data on transgenders,²³ there are around 4.9 lakh transgenders, of which 55, 000 are children ranging from age 0-6 years. India has several laws and provisions for the welfare of children and one of them which concerns the children is the Juvenile Justice Care and Protection of Children Act, 2015. In an article titled “*Children Beyond Gender – Relocating the Rights and Status of Transgender Children in the Context of Juvenile Justice System of India*”,²⁴ necessary changes were suggested in the Juvenile Justice Act, 2015 to expand the scope of the Act. To that extent, the inclusion of transgender children under the specific chapter of “Crimes against Children” would not only increase the visibility of crimes perpetrated against them but also shed light on the number

21 Bhumika Rajdev, ‘For Transgender Persons, Discrimination Begins in Schools’ (The Wire, 24 July 2020) <https://thewire.in/lgbtqia/cbse-results-transgender-students-education-stigma-discrimination> accessed 10 January 2021

22 Puja Bhattacharjee, ‘Police Violence Against LGBTQIA+ People in Kolkata Highlights Need for Sensitisation’ (The Wire, 30 July 2020) <https://thewire.in/lgbtqia/police-violence-against-lgbtqia-people-in-kolkata-highlights-need-for-sensitisation> accessed 10 January 2021

23 ‘Transgender in India’, Census 2011 <https://www.census2011.co.in/transgender.php> accessed 10 January 2021

24 Konina Mandal and Anwesa Panigrahi, Children Beyond Gender – Relocating the Rights and Status of Transgender Children in the Context of Juvenile Justice System of India (2020) 5 Journal on Rights of the Child, NLUO 28-39

of victims. Under the heading of offences against children, the statistics only mention “girl child victims”. Hence, the inclusion of male and transgender children would be beneficial.

G Data collection vis-à-vis the transgender community was excluded in the annual crime statistics of 2016. It was only in the year 2017, that the National Crime Records Bureau (NCRB) took care of this in Crime in India, 2017 Statistics²⁵. Based on the lack of data on the transgender community, NCRB should take assistance from NGOs for collecting data relating to the transgender community, including transgender children.

G Arrest and Prisons: On this point, recommendations by Commonwealth Human Rights Initiative (CHRI) are very helpful, considering the deplorable state of transgenders in prisons. The CHRI recommended that “The Central Government may formulate a model policy on ascertaining special needs of transgender persons in prisons, and outline guidance on documentation, search procedures, placement, medical facilities and recreational/welfare/ educational activities within prisons...”²⁶

Issues in this regard can be addressed by recruiting transgender para-legal volunteers (with access to NGOs and legal activists) in police stations.

G Women’s Cells within police stations address various grievances are tailored to make sure that women can access FIRs and make complaints swiftly and without discrimination. Similar cells can be made for representatives from non-heterosexual backgrounds for integration within the criminal justice system at the point of complaint.

5. Action Plan

This part identifies an action plan for identification, engagement and redressal of various problems with the involvement of stakeholders, students and legal bodies.

²⁵ National Crime Records Bureau, Crime in India 2017 Statistics I (Ministry of Home Affairs, 2019) https://ncrb.gov.in/sites/default/files/Crime%20in%20India%202017%20-%20Volume%201_0.pdf accessed 10 January 2021

²⁶ Commonwealth Human Rights Initiative and University of Dundee, ‘Lost Identity: Transgender Persons in Indian Prisons’ (Commonwealth Human Rights Initiative, 27 November 2020) <https://www.humanrightsinitiative.org/publication/lost-identity-transgender-persons-in-indian-prisons> accessed 10 January 2021

STEP 1: Identifying Volunteers

(Three Weeks)

Through print, electronic and social media make a public call to Activists*, Collectives/Organizations **

Committee will form a “sub-committee” consisting of District Judges
The District Judges will cover the districts by involving District Legal Services Authority (DLSA)

District Judges shall appoint Nodal Officer/Resource Person from each DLSA
Encourage students of Law Schools to volunteer for extracurricular activities on creating awareness in various strata of society regarding rights of LGBTQIA+ members
Engage Governing Bodies of Law Schools and Universities to integrate LGBTQIA+ rights in regular course work at undergraduate and postgraduate level

*Activist: an individual who has been engaging with or belongs to the LGBTQIA+ community and advocates social and political changes for the community.

** Collective/Organizations: A group of individuals or NGOs or political bodies who have been engaging with the LGBTQIA+ community and advocating for social and political change

STEP 2: Formation of Groups with Volunteers

(Two weeks)

Identify Collectives/Organizations & Activists for engaging as representatives in each district

DLSA will then form groups of volunteers in each district and locations within districts
Each group to have a representative each from a Collective/Organization, student volunteer and activists

In locations that do not have law colleges, DLSA will engage Para Legal Volunteers (PLVs)
Nodal officers shall communicate the nature of work to the group members

STEP 3: Design Engagement Programs to Reach Targeted Beneficiaries

(Three weeks)

Each group to be responsible for a particular area/areas
DLSA to brief the groups on programs for engagement with the targeted beneficiaries
Targeted beneficiaries to voluntarily self-identify
Each group to formulate a program for engaging with the targeted beneficiaries
Public announcements through social and print media for making the groups visible
Groups to engage targeted beneficiaries through structured questionnaires
Questionnaire themes: Health, Education, Legal Aid, Employment, Mental Health, Connecting opportunities with Activists/Organisations/Collectives

STEP 4: Interaction, Data Collection and Data Collation

(Six weeks)

Groups to interact with target audience, administer questionnaire and collect data

Authenticate and collate the collected data

Draw inferences from the collated data

Develop an appreciation for the nature of problems by discussing in-depth the inferences

drawn from the collected data with experts, field activists and social researchers

Disseminate the inferences drawn amongst District Judges, DLSA, and Group members

Make members aware of useful policies, e.g. Sweekruti Scheme of Odisha; Structure of

the Transgender Development Boards of Assam and West Bengal; the recommended

framework as per NALSA vs. *Union of India*

STEP 5: Initiating Solutions for Identified Problems

(Three weeks)

Based on shared inferences and an understanding of district level problems the District Judge with the help of DLSAs, Organizations, Collectives and Activists shall initiate solutioning

Problems that fall within their expertise and jurisdiction shall be tackled by them Problems beyond the jurisdiction and expertise of the District Judge and DLSA should be directed to specific administrative authority of the district like District Magistrate, Superintendent of Police, Block Development Officers and the like

From the level of the Sub Committee or the e-Committee of Supreme Court appropriate direction may also be issued to State's Chief Secretary highlighting the problems identified in each district with suggestions for remediation and request for implementation

STEP 6: Reporting to the Sub Committee and Follow-up

(Four weeks)

District Judge to initiate follow-up with the help of DLSA, Collectives, Organizations and Activists with respect to progress in program implementation

Escalate gaps in implementation to District Authorities and the Sub-committee

Submit program implementation report to the Sub-Committee

Continue working with the district level authorities like District Magistrate, Superintendent of Police, Block Development officers beyond the specified period of 4 weeks as a continual effort to bring about societal transformation

6. Strategies For Awareness

Awareness is to be undertaken as a means for information and empathy.

Government Authorities

- Involve Central and State level Government authorities to initiate awareness and sensitization programs using social, print, and electronic media with the aim to eradicate social prejudices against LGBTQIA+ community members.
- Involve Ministry of Corporate Affairs for reaching out to private and public sector corporations to sensitize their management.
- Involve Education Ministries of Central and State Governments for introducing programs targeted at students, teachers, administrators of educational institutions.
- Involve Home Ministry of Centre and States to mandatorily introduce sensitization and awareness training at all levels of law enforcement agencies.
- Involve Ministries of Social Justice, Ministry of Personnel and UPSC to train and sensitize all government employees and new recruits.

Organizations & Activists

- Encourage and enable organizations and activists who are already involved in spreading awareness about to reach out to a broader and deeper of segment target audience through multiple media and communication platforms.
- Motivate them to reach out to medical professionals, lawyers, teachers, and parents through targeted campaigns in matters of gender dysphoria and sexual orientation.
- Form groups of transgender children for film screenings, setting up resource centres, augmenting libraries with books and audio-visual materials on transgender issues, hold periodical sensitization events and adopt policies for preventing sexual harassment and bullying.

Media & Students

- Films, newspapers, social media have played a key role in changing and are crucial for disseminating information.
- Positive representation of LGBTQIA+ communities in different media will be a step forward in ensuring inclusivity.
- Social media influencers can play a key role in order to spread information and narratives of changing perceptions. This reach will be aided by individuals who identify specifically as vulnerable groups that form a part of the spectrum.
- Beyond academic discourse, student groups can reach out workplaces and localities through plays, music, dance and other innovative creative cultural programs around themes of equality and rights of LGBTQIA+ communities.

C. DISABILITY



INTRODUCTION

People with disabilities are an integral part of our economy and society. The opportunities and services available to them ought to be assured in the same way as they are for other citizens. Keeping this in mind, this note identifies the barriers to accessibility and inclusion of disabled persons in courts and three key areas, i.e., in *procedural* spaces like the established legal system, *substantive* outcomes i.e., equitable judicial outcomes and *promotional* capacities i.e., citizen's belonging and empowerment; and then proceeds to offer a roadmap to ensure an inclusive and accessible justice delivery system for persons with disabilities. The note is broadly divided into four parts- the *first* part traces the history of a gradual global shift from a narrow concept of *disability rights* to an emancipatory discourse of *disability justice* and identifies some foundational principles of the disability justice framework globally and in India. The *second* part locates disability justice in India within the broader framework of equality and non-discrimination, identifies barriers to access to justice for persons with disability and proceeds to offer a glimpse into some best institutional and judicial practices for accessibility and inclusion at the policy level. The *third* part charts a concrete ACTION (Accessible Courts and Technology for Implementation Of Non-discrimination) Plan as a roadmap for the subcommittee for further consultation. The *fourth* and the final part summarizes key recommendations.

1. Setting the Context

1.1 Nothing About Us Without Us: A Global History of Disability Rights

- (i) It is difficult to trace the exact moment in history when the disability rights movement emerged, but some campaigns and legislations may be indicators of key historical moments in the emergence of the disability rights movement across the globe.
- (ii) In the USA for example, World War I veterans with disabilities started putting pressure on the US Government to provide them with rehabilitation in exchange for their service to the nation leading to the 1930s in the United States witnessing the introduction of technical assistance through government contributing to the self-reliance of people with disability. This further intensified after World War II.
- (iii) When the civil rights movement began to take shape, disability advocates joined forces with other marginalized groups to demand equal treatment, including equal access and equal opportunity for them.²⁷
- (iv) United Nations General Assembly passed several resolutions pertaining to the need to care for and protect the disabled in the subsequent years. The declaration on the right

²⁷ See <https://www.adl.org/education/resources/backgrounders/disability-rights-movement>

of disabled persons was adopted in 1975 which stated that all persons have a right to live with dignity and emphasized the need to assure equal opportunities for social-economic advancement of disadvantaged or marginal sections of the society to achieve an effectively integrated society.

- (v) 1981 is generally considered a watershed year, when the United Nations declared the International Year of Disabled Persons. The following year, in 1982, the United Nations General Assembly by its Resolution 37/52 of 3rd December 1982 declared the World Programme of action concerning “Disabled Persons”. The World Program of Action called upon member states to create through legislation the necessary legal bases to achieve its objectives:

Assume responsibility for ensuring that disabled persons are granted equal opportunities with other citizens.

Undertake necessary measures to eliminate any discriminatory practices with respect to disability.

Give particular attention to conditions which may adversely affect the ability of disabled persons to exercise the rights and freedoms guaranteed to their fellow citizens.

Give attention to specific rights, such as rights to education, work, social security and protection from inhuman or degrading treatment and examine these rights from the perspective of disabled persons.

- (vi) The above actions and declarations marked a significant shift in the understanding of disabled persons from “objects of charity” to a recognition that they were rights-bearing citizens. The development of the social model of disability in these decades was responsible for these changes.

Medical Model	Functional Model	Social Model
<ul style="list-style-type: none"> • Disability as a consequence of a health condition, disease or caused by a trauma • Disrupt the functioning of a person in a physiological or cognitive way 	<ul style="list-style-type: none"> • Disability is caused by physical, medical or cognitive deficits • Limits functioning or the ability to perform functional activities 	<ul style="list-style-type: none"> • A person’s activities are limited not by the impairment or condition but by environment • Barriers are consequences of a lack of social organization

- (vii) The social model places responsibility on society and not on the disabled individual

to remove the material obstacle and cultural barriers encountered by disabled people which prevent them from exercising their rights and being fully included in society. With the development of the social model and relentless work by disabled people, the **United Nations Convention on the Rights of Persons with Disabilities** was created. The UNCRPD came into existence in 2008 to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities and to promote respect for their inherent dignity.

The Convention recognizes that disability is an evolving concept and that disability results from the interaction between persons with impairment and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.

- (viii) One of the significant aspects of the UNCRPD was that disabled people actively participated in the drafting process. The UNCRPD reiterates at several places while calling upon the state parties to meet their obligation, the necessity to involve civil society and disabled people’s organizations in the implementation of the Convention embracing the slogan “Nothing About Us Without Us.”
- (ix) Reasonable Accommodation, Accessibility and Access to Justice are some of the core features of the Convention.

The Convention defines “reasonable accommodation” as “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms” in Article 2 and demands this all aspects of life including inclusive education.

In its Article 9, the Convention stresses that persons with disabilities should be able to live independently and participate fully in all aspects of life. To this end, States Parties should take appropriate measures to ensure that persons with disabilities have access, to the physical environment, to transportation, to information and communications technology, and to other facilities and services open or provided to the public. Accessibility can be grouped into three main groups. 1. physical accessibility 2. service accessibility 3. accessibility to communication and information.

Article 13 of the Convention affirms the effective access to justice for persons with disabilities, stating that: States parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

In order to help to ensure effective access to justice for persons with disabilities, states Parties are to promote appropriate training for those working in the administration of justice, including police and prison staff.

1.2 From Disability Rights to Disability Justice

The last few decades have seen intersectionality emerge as a paradigm for addressing the issue of disability. The term was coined in 1989 by Kimberlé Crenshaw and since then it has travelled across the globe as a useful concept to understand how different axes of power intersect.

Intersectionality →

“Consider an analogy for traffic in an intersection, coming and going in all four directions. Discrimination, like traffic through an intersection, may flow in one direction, and it may flow in another. If an accident happened in an intersection, it can be caused by cars travelling from any number of directions and, sometimes, from all of them. Similarly, if a Black woman is harmed because she is in the intersection, her injury could result from sex discrimination or race discrimination.”

[Crenshaw, ‘Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics’ University of Chicago Legal Forum, 1989]

Intersectionality has percolated into the understanding disability rights as well, by acknowledging that disability intersects with other identities thereby contributing to an understanding of complex and interwoven categories of difference for persons with disabilities.

Disability activists, for example, have coined “disability justice” as a preferred term over disability rights, since the former captures an intersectional notion of disability rights. The term (“Disability justice”) was coined by the black, brown, queer, and trans members

of the Disability Justice Collective, founded in 2005 by Patty Berne, Mia Mingus, Stacey Milbern, Leroy Moore, Eli Clare, and Sebastian Margaret.²⁸

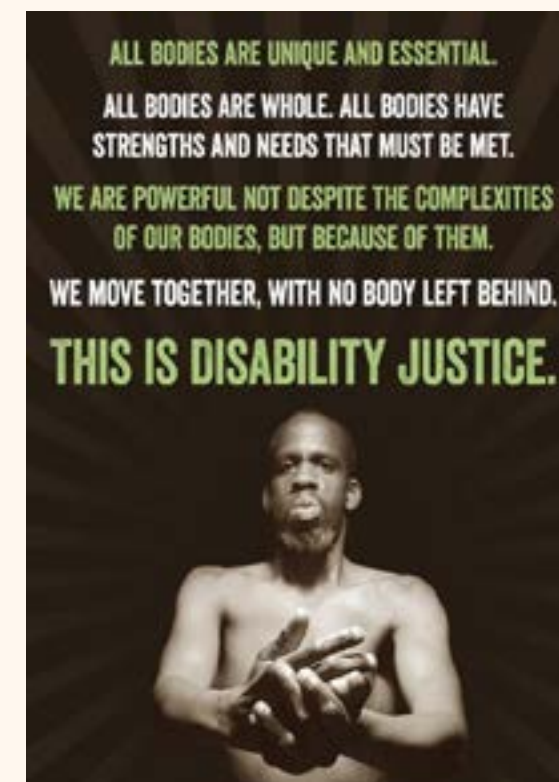
Disability justice is the framework of the social movement initiated to end ableism in conjunction with ending other systems of oppression. The disability justice movement distinguishes itself as a departure from the disability rights movement, which focuses on civil rights within the liberal tradition.²⁹

The disability justice framework, therefore, calls for an intersectional framework for understanding disability rights where disability is not merely an isolated category of exclusion, but a product of multiple intersectional identities like race, class, caste, sex, gender, sexuality and disability.

A disability justice framework understands that:

- All bodies are unique and essential
- All bodies have strengths and needs that must be met.
- We are powerful, not despite the complexities of our bodies, but because of them.
- All bodies are confined by ability, race, gender, sexuality, class, nation state, religion, and more, and we cannot separate them.

[Adapted from Patty Berne’s “Disability Justice - A Working Draft” Published in *Skin, Tooth, and Bone: The Basis of Movement is Our People, A Disability Justice Primer*, Second Edition.]



1.3 Evolution of Disability Law in India

The Rights of Persons with Disabilities Act, 2016 (the ‘new Act’ and/or the RPD Act) came into force on 19 April 2017 under the UNCRPD. Subsequently, the Rules were notified on June 15, 2017. The RPD Act replaced the Persons with Disabilities (Equal Opportunity Protection of Rights and Full Participation) Act, 1995 (the ‘previous Act’ and/or PwD Act). The new Act implements India’s obligations under the United Nations Convention on the Rights of Persons with Disabilities, which was ratified in 2007.

²⁸ <https://clpr.org.in/blog/disability-rights-to-disability-justice-indias-case-for-a-transition/>

²⁹ Catherine Jampel (2018): Intersections of disability justice, racial justice and environmental justice, *Environmental Sociology*

Before the enactment of the RPD Act 2016, the primary law catering to persons with disability was the Persons with Disability (Equal Opportunity Protection of Rights and Full Participation), Act 1995. While the law succeeded in reserving 3 percent of seats in a government job and declared that PwDs should be given equal opportunities and not denied fundamental needs like education and employment, there were several gaps still. First, its definition of PwD was rigid since it not only defined merely seven different types of disability but also held that to qualify as a PwD, a person needed to “suffer from 40% or more disability”. A vague definition of this nature made it difficult to implement the law. Second, while it prescribed accessibility of public buildings and transport, it neither provided any guideline nor any timeline for implementation. It also excused authorities from implementing the law if it exceeded their economic capacity and development, leading to non-implementation of the law.

Any person who “intentionally insults or intimidates with intent to humiliate a person with a disability in any place within public view” is punishable with imprisonment. 4% of all vacancies in the government organizations will be reserved for disabled people.

Provision of special courts in each district. These special courts will handle cases pertaining to the violation of the rights of PwD.

Every child with disability gets free education from the age of 6 to 18.

State Governments will constitute district-level committees to address the local issues of PwD.

1.4 Disabled Persons and Forms of Disability

The Preamble to the Convention on the Rights of Persons with Disabilities (CRPD) 2006, adopted by the United Nations, describes disability by stating: “Disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others.”

The Convention further emphasizes that “Persons with disabilities include those who have long term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”

The World Health Organization (WHO) defines ‘Disability’ as “an umbrella term, covering impairments, activity limitations, and participation restrictions. Impairment is a problem in body function or structure; an activity limitation is a difficulty encountered by an individual in executing a task or action; while a participation restriction is a problem experienced by an individual

in involvement in life situations. Thus disability is a complex phenomenon, reflecting an interaction between features of a person’s body and features of the society in which he or she lives.”

As per the Rights of Persons with Disabilities Act 2016, a ‘person with disability’ refers to a person with long-term physical, mental, intellectual or sensory impairment which, in interaction with barriers, hinders his full and effective participation in society equally with others. This means, wherever the term *person with disability* is mentioned in the Act, it covers anyone and everyone who fulfills the following two conditions i.e.

- a. Having a long-term impairment which could be physical, mental, intellectual, or sensory.
- b. Her/his need to participate is affected by a barrier.”

According to S. 2(c) of RPD Act, ‘barrier’ means any factor including communicational, cultural, economic, environmental, institutional, political, social, attitudinal and structural which hampers the full and effective participation of persons with disabilities in society. ”

Communicational Barrier

A film without captions, or a website that is not accessible using a screen reader.

Economic Barrier

Experiencing increased cost of living due to disability i.e. additional transportation costs and so on.

Cultural Barrier

A person is not invited to a wedding because her/his presence is regarded as a “curse”.

Environmental Barrier

A place that can be accessed only with steps. No accessibility aids like lifts/ ramps, suitable signage etc. are present.

Institutional Barrier

Policies/procedural rules which are inflexible. For example, a company could have a recruitment policy that is very rigid with respect to qualification, age, minimum marks or it could have rigid assessment procedures, etc. There is no provision made for reasonable accommodation and flexibility.

Political Barrier

Barriers that prevent people from participating in politics, like inaccessible polling booths, inaccessible Electronic Voting Machines (EVMs), etc.

Social Barrier

Presence of social stigma. For example, an employee with mental illness say, is left out of recreational, social or business gatherings. Another example would be people excluding a person with disability by gossiping unnecessarily about the person's disability or by not inviting her/ him for social gatherings due to the person's disability, and the like

Attitudinal Barrier

Stereotyping persons with disabilities i.e. short statured people are treated like children, a person with disability is not promoted as the manager feels she cannot handle a team or the pressure of a job and so on.

Structural Barrier

This is the same as a contextual barrier i.e. a barrier related to accessibility, policies, procedures, etc. where a clear distinction of "us" and "them" is created and/or supported

Source: American India Foundation.
"MANUAL: The Rights of Persons with Disabilities Act, 2016

Number of Recognized Disability Conditions increased

<p>From</p> <p>7</p> <p>to</p> <p>21</p>	1. Blindness	11. Muscular Dystrophy
	2. Low Vision	12. Chronic Neurological conditions
	3. Leprosy Cured Persons	13. Specific Learning Disabilities
	4. Hearing Impairment	14. Multiple Sclerosis
	5. Locomotor Disability	15. Speech and Language Disability
	6. Dwarfism	16. Thalassemia
	7. Intellectual Disability	17. Hemophilia
	8. Mental illness	18. Sickle Cell Disease
	9. Autism Spectrum Disorder	19. Multiple Disabilities
	10. Cerebral Palsy	20. Acid Attack Victims
		21. Parkinson's disease

Image Courtesy: <https://wecapable.com/rpwd-act-2016-summary-overview-infographic/>

1.5 Disability Data: Indications and Implications

The Decennial Population Census and Large-Scale Sample Surveys are the two primary modes of collecting data on persons with disability. The Census 2011, conducted by the

Office of the Registrar General and Census Commissioner and a country wide Large-Scale Sample Survey of the 76th round of National Sample Surveys (NSS) which was conducted by the National Statistical Office (NSO) under the Ministry of Statistics and Programme Implementation (MoSPI) during July-December 2018 is the latest sample survey on disability. Earlier this year, the MoSPI has brought out a statistical publication namely, 'Persons with Disabilities (Divyangjan) in India-A Statistical Profile: 2021',³⁰ based on the findings of the recent National Sample Survey of Persons with Disabilities and Census of India 2011. Together, these publications and the data present highlight the socio-economic condition of disabled groups and indicate that disability exists as a form of marginality along with other markers of identity and marginality. Some of these indicators are presented below:

- Census 2011 estimates that out of 1.2 billion people in India, about 26.8 million are disabled and they make up 2.21 percent of the total population. As per this data, there are 14.9 million men with disabilities as compared to 11.9 million women in the country.
 - The rural population accounts for far more disabled people (over 18 million) than those within urban settings (8.1 million).
 - The percentage of men with disabilities is 2.41 percent as against 2.01 in women.
 - The social groups-wise analysis demonstrates that 2.45 percent of the total disabled population belong to the Scheduled Castes (SC), 2.05 percent to the Scheduled Tribes (ST) and 2.18 percent to other than SC/ST.
- | Social Group | Persons | Males | Females |
|------------------|---------|-------|---------|
| Total | 2.21 | 2.41 | 2.01 |
| SC | 2.45 | 2.68 | 2.2 |
| ST | 2.05 | 2.18 | 1.92 |
| Other than SC/ST | 2.18 | 2.37 | 1.98 |
- The Census 2011 revealed that, in India, 20% of the disabled persons have a disability in movement, 19% suffer a disability with sight, 19% are with disability in hearing and 8% have multiple disabilities
 - Elderly (60+ years) disabled constituted 21% of the total disabled at all India level.

³⁰ See [https://www.mospi.gov.in/documents/213904/301563/Persons%20with%20Disabilities%20\(Divyangjan\)%20in%20India-%20A%20Statistical%20Profile%202021_MoSPI1617249410332.pdf/838baf9e-4a4c-358a-af2a-741799be70bb](https://www.mospi.gov.in/documents/213904/301563/Persons%20with%20Disabilities%20(Divyangjan)%20in%20India-%20A%20Statistical%20Profile%202021_MoSPI1617249410332.pdf/838baf9e-4a4c-358a-af2a-741799be70bb)

- g. The percentage of disabled persons is highest within the age group 10-19 years followed by age group 20-29 years for both the male and female disabled persons. Among the disabled males, 18% are elderly (above 60 years of age) whereas 23% of female disabled are elderly.
- h. As per census-2011, about 54 percent of the disabled children were with multiple disabilities and 50 percent of the children with mental illness never attended educational institutions.
- i. Among the total disabled persons, 45% are illiterate. 13% of the disabled population has metric/ secondary education but are not graduates and 5% are graduates and above. Nearly 8.5% of disabled literates are graduates.
- j. Among the male disabled persons, 38% are illiterate. 16% of the disabled male population has metric/ secondary education but are not graduates and 6% are graduates and above. About 9% of the male disabled literates are graduates.
- k. Among the female disabled persons, 55% are illiterate. 9% of the disabled female population has metric/secondary education but are not graduates and 3% are graduates and above. Nearly, 7.7% of the female disabled literates are graduates.

The data indicate that disability is not an isolated issue and that policies for inclusive development and accessibility need to consider the multiple forms of marginalities like age, class, caste, sex, gender, location that disabled groups face.

2. Accessibility and Inclusion for the Disabled (AID)

2.1 Access to Justice

- 1) Access to justice includes not only procedural access (i.e., effectively engaging with the established legal system) but also substantive access (i.e., equitable and beneficial judicial outcomes) and promotional access (i.e., promotion of citizens' belonging and empowerment).³¹ It therefore not only embraces the existence of rights enshrined in laws, both procedural and substantive but also in generating awareness about the same. Access to dispute resolution mechanisms, both formal and informal are part of any access to justice mechanism. The United Nations has stated that access to justice means 'much more than improving an individual's access to courts... It must be defined in terms of ensuring that legal and judicial outcomes are just and equitable'.³²

³¹ Eilionóir Flynn, *Disabled Justice?: Access to Justice and the UN Convention on the Rights of Persons with Disabilities* (Routledge 2016)

³² United Nations Development Programme (UNDP), *Access to Justice: Practice Note*, 2004, p 3.

- 2) Access to justice in the context of disability will imply equally, the ability to fully be heard and to participate in all aspects of the justice system without discrimination based on disability. Examples of barriers in the justice system include ³³:

- G Physically inaccessible courtrooms
- G Lack of Sign Language interpreters during police interrogations or court hearings
- G Failure to provide needed medications and healthcare treatment to incarcerated individuals in jail or prison

- 3) This, therefore, means that increasing access to justice for PwD must involve fair treatment before and under the law and ensuring substantive and procedural due process in all aspects of litigation and court procedure including -

- G During interaction with police, either as a victim of a crime or as the alleged perpetrator
- G During hearings and trials, whether participating as a litigant or a lawyer, or judge, or court staff.
- G During quasi-judicial and administrative hearings
- G During incarceration in prison

- 4) Article 13³⁴ UNCRPD has three key elements. Disabled people: (a) have the right to access justice on an equal basis with others; (b) are to be provided with procedural and age-appropriate accommodations; (c) are to be supported as direct and indirect participants in all legal proceedings.

- 5) The UN Special Rapporteur on the Rights of Persons with Disabilities in consultation with the Committee on the Rights of Persons with Disabilities prepared and submitted the *International Principles and Guidelines on Access to Justice for Persons with Disabilities*³⁵ (hereinafter "the Guidelines") last year, which has been endorsed by the International Disability Alliance and the International Commission of Jurists. The Guidelines note that "while access to justice is fundamental for the enjoyment and fulfillment of all human rights, many barriers prevent persons with disabilities from accessing justice on an equal basis with others. Such barriers include restrictions on the exercise of legal capacity; lack of physical

³³ See <https://www.globaldisabilityrightsnow.org/tools/increasing-access-justice-people-disabilities>

³⁴ Article 13 – Access to justice

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

³⁵ See <https://reliefweb.int/report/world/international-principles-and-guidelines-access-justice-persons-disabilities>

access to justice facilities, such as courts and police stations; lack of accessible transportation to and from these facilities; obstacles in accessing legal assistance and representation; lack of information in accessible formats; paternalistic or negative attitudes questioning the abilities of persons with disabilities to participate during all phases of the administration of justice; and lack of training for professionals working in the field of justice. In the justice system, persons with disabilities are often considered to be unworthy of, unable to benefit from or even likely to be harmed by due process protection provided to all other citizens. Even fundamental rights, such as the right to remain silent and the presumption of innocence, may be denied either directly in law or policy or indirectly in custom and practice. The risks are extreme –e.g. false confessions, erroneous verdicts and unlawful deprivation of liberty.”

- 6) Principle 1 of the Guidelines, among other things expects States to-
- G Create an actionable and enforceable right to receive the individually determined procedural accommodations, including support, necessary to enable persons with disabilities to participate effectively in all proceedings in any court, tribunal or forum;
 - G Provide intermediaries or facilitators, wherever and whenever needed, to enable clear communication among and between persons with disabilities and courts, tribunals and law enforcement agencies to ensure safe, fair and effective engagement and the opportunity to fully participate in legal processes;
 - G Ensure that persons who have been declared to be without the capacity for any purpose have the right to appeal or otherwise seek restoration of their legal capacity and have access to legal assistance to pursue their claims;
 - G Establish or support alternative justice mechanisms, such as restorative justice, alternative dispute resolution mechanisms, and cultural and social forms and forums of justice, that are available to persons with disabilities on an equal basis with others, without regard for any construct of capacity to participate;
 - G Repeal or amend laws, regulations, policies, guidelines and practices, including court orders, that subject, without the full due process of law, defendants with disabilities to detention in a prison, a mental health facility or other institution for a definite or indefinite term (sometimes referred to as “care-related hospitalization”, “security measures” or “detainment at the governor’s pleasure”) based on perceived dangerousness or need for care.

- 7) The Guidelines call for establishing, funding and implementing a programme of independent intermediaries or facilitators trained to provide communication assistance to parties to the proceedings and the justice system to determine whether accommodations and support are necessary and which accommodations and support are appropriate, and to assist with communication throughout the proceedings; and designing and implementing a programme of independent intermediaries or facilitators in a manner consistent with local procedures and customs, and in line with the Convention on the Rights of Persons with Disabilities.
- 8) The Guidelines also recommends (Principle 3) procedural adjustments and modifications to accommodate the needs of persons with disabilities:

Procedural adjustments and modifications

- (c) Adopting procedures for hearings that ensure the fair treatment and full participation of persons with disabilities, including children with disabilities, during proceedings, as appropriate, such as:
 - (i) Adaptation of the venue;
 - (ii) Appropriate waiting spaces;
 - (iii) Removal of cloaks and wigs;
 - (iv) Adjustments to the pace of proceedings;
 - (v) Separate building entrances and waiting rooms and protective screens to separate persons with disabilities from others if necessary due to physical or emotional distress;
 - (vi) Modifications to the method of questioning in appropriate circumstances, such as allowing leading questions, avoiding compound questions, finding alternatives to complex hypothetical questions, providing extra time to answer, permitting breaks as needed and using plain language;

.....
- (d) Allowing persons with disabilities, at all stages of the process if they so choose, to be accompanied by family, friends or others to provide emotional and moral support, which does not replace the role of an intermediary or facilitator.

- 9) The Guidelines also prescribe communication support for persons with disabilities and to ensure that all processes in the justice system provide the technical and other support necessary for parties, witnesses, claimants, defendants and jurors to use any form of communication necessary for their full participation including assistive listening systems and devices, open, closed and real-time captioning and closed caption

decoders and devices, voice, text and video-based telecommunication products, videotext displays, computer-assisted real-time transcription, screen reader software and optical readers, video description and secondary auditory programming devices that pick up audio-feeds for television programmes, supporting communication in addition to intermediaries or facilitators, through the use of third parties, including note-takers, qualified sign language and oral interpreters, ensuring that all interpreters are able to interpret effectively, accurately and impartially, both receptively (i.e. understanding what persons with disabilities are saying) and expressively (i.e. having the skill necessary to convey information back to those persons), while using any necessary specialized vocabulary (e.g. legal or medical) and respecting professional and ethical standards.

- 10) Access to Justice is at the heart of the RPD Act as well. The Act categorically states that a disability must not come in the way of a person trying to access court, tribunal, authority, commission or any other body having judicial or quasi-judicial or investigative powers. The onus to provide support measures has been put on the institution to enable access and inclusion.

12. Access to justice. —

- (1) *The appropriate Government shall ensure that persons with disabilities are able to exercise the right to access any court, tribunal, authority, commission or any other body having judicial or quasi-judicial or investigative powers without discrimination on the basis of disability.*
- (2) *The appropriate Government shall take steps to put in place suitable support measures for persons with disabilities specially those living outside family and those disabled requiring high support for exercising legal rights.*
- (3) *The National Legal Services Authority and the State Legal Services Authorities constituted under the Legal Services Authorities Act, 1987 (39 of 1987) shall make provisions including reasonable accommodation to ensure that persons with disabilities have access to any scheme, programme, facility or service offered by them equally with others.*
- (4) *The appropriate Government shall take steps to—*
- (a) *ensure that all their public documents are in accessible formats;*
- (b) *ensure that the filing departments, registry or any other office of records are supplied with necessary equipment to enable filing, storing and referring to the documents and evidence in accessible formats; and*
- (c) *make available all necessary facilities and equipment to facilitate recording of testimonies, arguments or opinion given by persons with disabilities in their preferred language and means of communication.*

- 11) The National and State Legal Services Authorities have been made responsible for ensuring that every scheme, programme, facility or service provided by them must also be accessible to persons with disabilities. This can be done only when these authorities make reasonable adjustments or modifications to all their programs so that they may be accessed equally by disabled and also non-disabled people.³⁶

- 12) Further, the Act and the accompanying Rules³⁷ state that all public documents must be in accessible formats. Judicial records are public documents too. All those departments/offices in courts where documents are to be filed, registered or stored should have the equipment to ensure that processes like filing, storing and referring could be done through accessible formats. This means that all documents should be accessed in audio/braille format by people with visual/ hearing impairments, sign language and interpretation for deaf and persons hard of hearing, easy read or video guides for persons with psychosocial or intellectual disabilities.³⁸

- 13) Communication is defined in the RPD Act as follows:

2(f) “communication” includes means and formats of communication, languages, display of text, Braille, tactile communication, signs, large print, accessible multimedia, written, audio, video, visual displays, sign language, plain-language, human-reader, augmentative and alternative modes and accessible information and communication technology

However, no court in India, including the Supreme Court has a Sign Language Interpreter, making effective communication for the deaf and hard of hearing community nearly impossible. This becomes striking considering that as per the 2011 Census, the population of persons with hearing impairment is 1.3 million and according to the National Association for the Deaf, this number is 18 million people, which is 1 percent of the population.

³⁶ See <http://www.thehansfoundation.org/wp-content/uploads/2019/07/FINAL-Handbook-on-the-RPWD-Act-2016-ENGLISH.pdf>

³⁷ Accessibility 15. **Rules for Accessibility.** - (1) Every establishment shall comply with the following standards relating to physical environment, transport and information and communication technology, namely :- (a) standard for public buildings as specified in the Harmonised Guidelines and Space Standards for Barrier Free Built Environment for Persons With Disabilities and Elderly Persons as issued by the Government of India, Ministry of Urban Development in March, 2016; (b) standard for Bus Body Code for transportation system as specified in the notification of the Government of India in the Ministry of Road Transport and Highways, vide number G.S.R. 895(E), dated the 20th September, 2016; (c) Information and Communication Technology - (i) website standard as specified in the guidelines for Indian Government websites, as adopted by Department of Administrative Reforms and Public Grievances, Government of India; (ii) documents to be placed on websites shall be in Electronic Publication (ePUB) or Optical Character Reader (OCR) based Pdf format: Provided that the standard of accessibility in respect of other services and facilities shall be specified by the Central Government within a period of six months from the date of notification of these rules. (2) The respective Ministries and Departments shall ensure compliance of the standards of accessibility specified under this rule through the concerned domain regulators or otherwise. 16. Review of Accessibility Standards. - The Central Government shall review from time to time the accessibility standards notified based on the latest scientific knowledge and technology.

³⁸ See <http://www.thehansfoundation.org/wp-content/uploads/2019/07/FINAL-Handbook-on-the-RPWD-Act-2016-ENGLISH.pdf>

- 14) The National Association for the Deaf recognizes that accessibility for the deaf involves the use of subtitles and the services of interpreters to communicate with hard of hearing people, sign boards, emergency lights for fire or other emergencies, website content in sign language for easy understanding and learning. Access in various government buildings like social welfare building, police stations, hospitals, doctors, etc. through an interpreter for communication.³⁹
- 15) The American Bar Association's Commission of Disability Rights in their *Guide: Court Access for Individuals who are Deaf and Hard of Hearing*⁴⁰ lays down some best courtroom practices which can be referred to by courts, judges, litigants, lawyers and service providers. These include creating a statewide court rule or other uniform policy appropriate for the state's court system for providing auxiliary aids and services to deaf or hard of hearing court participants throughout the court system, to post the rule or policy on the agency's public website in an easy-to-find location, to designate a court coordinator to handle requests for accommodations, including auxiliary aids and services, offer training and provide educational materials to judges, magistrates, commissioners, court administrators and court personnel regarding communication access. The topics to be covered might include what the law requires, what constitutes effective communication, how to obtain and use various types of auxiliary aids and services and the proper etiquette for interacting with persons who are deaf or hard of hearing.
- 16) Some other recommendations include –
- G Provide a visual method of calling individuals who are deaf or hard of hearing in the courthouse/courtroom.
 - G Install visual alarms in hallways, restrooms, lobbies, courtrooms, and deliberation rooms.
 - G Maintain an adequate supply of readily available interpreters capable of appearing in an expedited manner with little advance notice.
 - G Be flexible regarding the positioning of interpreters, transliterators, captioners, and participants.

³⁹ See <http://nadindia.org/Projects/Accessibility>

⁴⁰ See <https://www.americanbar.org/content/dam/aba/administrative/commission-disability-rights/court-access-guide-lr-intracvtv-accsb-rev022317.authcheckdam.pdf>

- 17) A visually challenged law student made the following recommendations⁴¹ to make an accessible courtroom as follows:

Proceeding in court The martial and peons in courts should be more cooperative and helpful to impaired lawyers and assist them in all prospects instead of taking bribes from them and harassing them. The impaired lawyers should have the freedom to use PPT while arguing cases especially in High courts and Supreme courts. The cross examination process should be reformed and modified for visually challenged persons as such processes rely a great deal on facial expressions of the witness, which is difficult for the impaired lawyers to comprehend. When the impaired lawyers are conducting cross examination the witness, he or she should be allowed to take the help of others. The judges should observe such cases more carefully. For better output from impaired lawyers there is a need to educate others dealing with such lawyers; they should communicate more through words than through actions and expressions. Every court must have a website where the lawyers can check the status of their case. This would be of great benefit to visually challenged lawyers.

Accessibility A system should be put in place where the impaired lawyers should be informed in advance about the approximate time of different cases in different courts, removing the hassle of repeatedly checking the boards outside court rooms where things are written so faintly that it is difficult to read even for sighted people. Such updates can be given by SMS. Machines should be installed which speak aloud the name of the court and the judge as one enters the court. The outlay of the court building should be shown through an enlarged map on every floor. In some of the larger courts help desks should be present at the entrance.

Submission of documents For the sake of convenience visually handicapped lawyers should be allowed to file documents online.

E-library For the benefit of impaired lawyers the libraries in courts should have e-learning facility and all computers should have soft wares like MAGIC and JAWS installed to help impaired lawyers. Books especially Bare Acts should be available in Braille. Hence, by making such alterations in courts and changes in the legal system, visually impaired lawyers can bridge the gap and practice (law) to the same extent as full sighted lawyers with enthusiasm.

⁴¹ See <https://bangaloremirror.indiatimes.com/bangalore/others/visually-handicapped-sms-bare-acts-lawyers-ppt/articleshow/33515255.cms>

18) Recently, the Chairperson, e-Committee of the Supreme Court has made some suggestions to make eCourt services more accessible. These include, among other things the following-

- (i) *Wherever entering visual captchas is a requirement to access any information, audio captchas must also be provided. Such audio must be clear — the audio captcha deployed on the Supreme Court website is a good example of a functional audio captcha.*
- (ii) *Judgments/orders are sometimes inaccessible due to the placement of watermarks on each page which must be done away with. Further, judgments in the PDF format should be auto-tagged to be accessible to visually challenged persons. PDFs are, overall, not user-friendly for visually challenged users. Therefore, The High Courts should consider releasing judgments in HTML format on their websites, along with their PDF equivalent.*
- (iii) *Court websites must have Clearly labeled buttons, and calendars to select dates must be accessible. This can be done by using a regular edit box for entering a date, month and year, instead of using read-only boxes.*

2.2 Designing Accessibility

The architecture of our courts poses a considerable challenge to equitable access. New and innovative design solutions are needed to address this issue. The US Supreme Court for example observed in *Tennessee v Lane*, that the “unequal treatment of disabled persons in the administration of justice has a long history” (541 U.S. 509, 531 (2004)).

Accessibility is obstructed by existing judicial infrastructure⁴² - physical, personnel as well as digital, in many ways. A Report by Vidhi Legal Policy, states that “*physical infrastructure* can include many things that go beyond the four walls and roof of a courthouse (and the courtrooms inside it), such as the judge’s bench, podiums for lawyers, witness boxes, judges’ chambers, registry and other offices. It includes features to enable access and maneuverability, such as ramps for the disabled, elevators, signages in different languages.”

To date, the only official report on the court’s (physical) infrastructure has come from a **Report** prepared by the National Court Management Systems (NCMS) Committee, which was set up to upgrade court management systems, by the Chief Justice of India in consultation with the Minister of Law and Justice in 2012. This remains the only authoritative source for

⁴² The first is physical infrastructure, which includes court buildings, rooms, features such as elevators, provisions for drinking water, etc. The second is personnel infrastructure, which includes judicial officers (judges), court staff (court masters, stenographers, registry staff, etc.), and lawyers. The third is digital infrastructure, which includes computers, information technology, and the judiciary’s overall web presence (such as court websites, e-courts mobile applications, etc.). See <https://vidhilegalpolicy.in/research/2018-4-19-status-of-physical-infrastructure-in-lower-judiciary/>

infrastructure benchmark by judiciary so far.

The *Baseline Report or NCMS Report*⁴³ identified the causal connection between poor infrastructure and lack of access to justice. It identified the primary requirements of a self-sufficient court complex as follows:

1. *The infrastructure design must conform to international standards.*
2. *It must cater to the needs of all concerned.*
3. *The design must be universal and with inherent flexibility to meet the local needs and conditions.*
4. *The court complex must be user-friendly, for lawyers, litigants, general public, witnesses and police officials;*
5. *It must have proper signage and notice boards in readable formats and languages at appropriate places.*
6. *It must be barrier-free to cater to the needs of the persons with disability, senior citizens and infirm persons;*
7. *The court complex must be self-sufficient in terms of power backup and other essential services like security and surveillance;*
8. *The buildings have to be fully IT-enabled to permit the incorporation of the latest technology geared to enhance the efficiency of the judicial system.*
9. *The court complex must be easily accessible by advocates and litigants and there should be provision for public transport nearby.*

The NCMS Report mentions the phrase “universal design”, which has enjoyed approval from disability rights activists for a while now . Universal Design is the design and composition of an environment so that it can be accessed, understood and used to the greatest extent possible by all people regardless of their age, size, ability or disability. ⁴⁴ As per the Rules framed under the RPD Act in 2017, all public buildings (including those owned privately) have to conform to the ‘Harmonised Guidelines and Space Standards on Barrier Free Built Environment for Persons with Disability and Elderly Persons’ (HG), 2016. HG was developed by Ministry of Urban Development (MoUD) to solve the problem of multiple standards for accessibility of built environment in the country. Prior to the HG 2016, other building codes were in operation like the National Building Code (NBC).⁴⁵ The

⁴³ See http://nja.gov.in/Concluded_Programmes_2015-16/P-960_Reading_Material/05.%20reort%20Submitted%20by%20the%20Sub-Committee%20headed%20by%20Hon.%20Mr.%20Justice%20Badar%20Durrez%20Ahmed-Court%20Development%20Planning%20System%20ver%202.0-1.pdf

⁴⁴ See <http://universaldesign.ie/What-is-Universal-Design/>

⁴⁵ For a comprehensive discussion on HG and NBC vis-à-vis accessibility standards, kindly refer to https://www.ncpedp.org/sites/all/themes/marinelli/documents/COMPARISON%20OF%20DIFFERENT%20GUIDELINES_2016.pdf See also <https://www.ncpedp.org/sites/all/themes/marinelli/documents/>

NBC was subsequently modified in 2016 as well. These guidelines are based on Universal Design principles and together, these provide a framework for accessible public buildings for persons with disabilities.

A recent Report⁴⁶ by Vidhi Legal Policy evaluated the infrastructure of India's district courts on the parameters provided by the Baseline Report. To assess whether district court complexes met some of the basic requirements for accessibility, the survey examined the availability of ramps, tactile pavements and braille notices for those with visual impairment, and separate washrooms designated for persons with disabilities. Most district court complexes performed poorly on this parameter. Only 27% or 180 court complexes were accessible through ramps and/or lifts, whereas only 11% or 73 court complexes had designated washrooms for persons with disabilities, and only 2% or 13 court complexes had built-in visual aid features.⁴⁷

The Report also recommended that most court complexes are old, the Department of Justice should conceptualise a scheme for renovation and maintenance of older, existing court complexes, to align with Universal Design principles. These principles, developed in 2011 through the joint effort of architects, academicians and disability rights activists, are design guidelines to enable seamless access to any building regardless of age, gender or disability of any person.

Access Audits of several public buildings including the Supreme Court have been conducted under the Accessible India Campaign launched in 2015 by the Department of Empowerment for Persons with Disabilities, under the Ministry of Social Justice and Welfare, Government of India. The performance⁴⁸ by the Supreme Court is quite poor. It failed to meet the requirement of providing information and communication regarding services available in the building nor did it have any trained personnel who could help with access issues. The Report also found that the Court did not have any plan to improve accessibility issues and that there was no equal opportunities policy to promote the employment of staff with disabilities in place.

NBCReview%20Report.pdf

46 See https://vidhilegalpolicy.in/wp-content/uploads/2019/08/National-report_single_Aug-1.pdf

47 The district court complexes at Chandigarh and Mohali were the only court complexes to have all three features, i.e., ramps and lifts, designated washrooms for persons with disabilities, and visual aid features. Visual aid features were the rarest to find. Only 12 district court complexes had provisions for visual aid at both the entry and the main court building: Chandigarh, Dausa (Rajasthan), Goalpara (Assam), Mahe (Puducherry), Kasaragod (Kerala), Kavaratti (Lakshadweep), Mohali (Punjab), Panchkula (Haryana), Patna (Bihar), Puducherry, Wayanad (Kerala), West Siang (Arunachal Pradesh). (See Vidhi Report)

48 See Access Audit Report, Supreme Court of India, May (2016) available at <http://disabilityaffairs.gov.in/upload/uploadfiles/files/delhi/4%20Su-preme%20court.pdf>

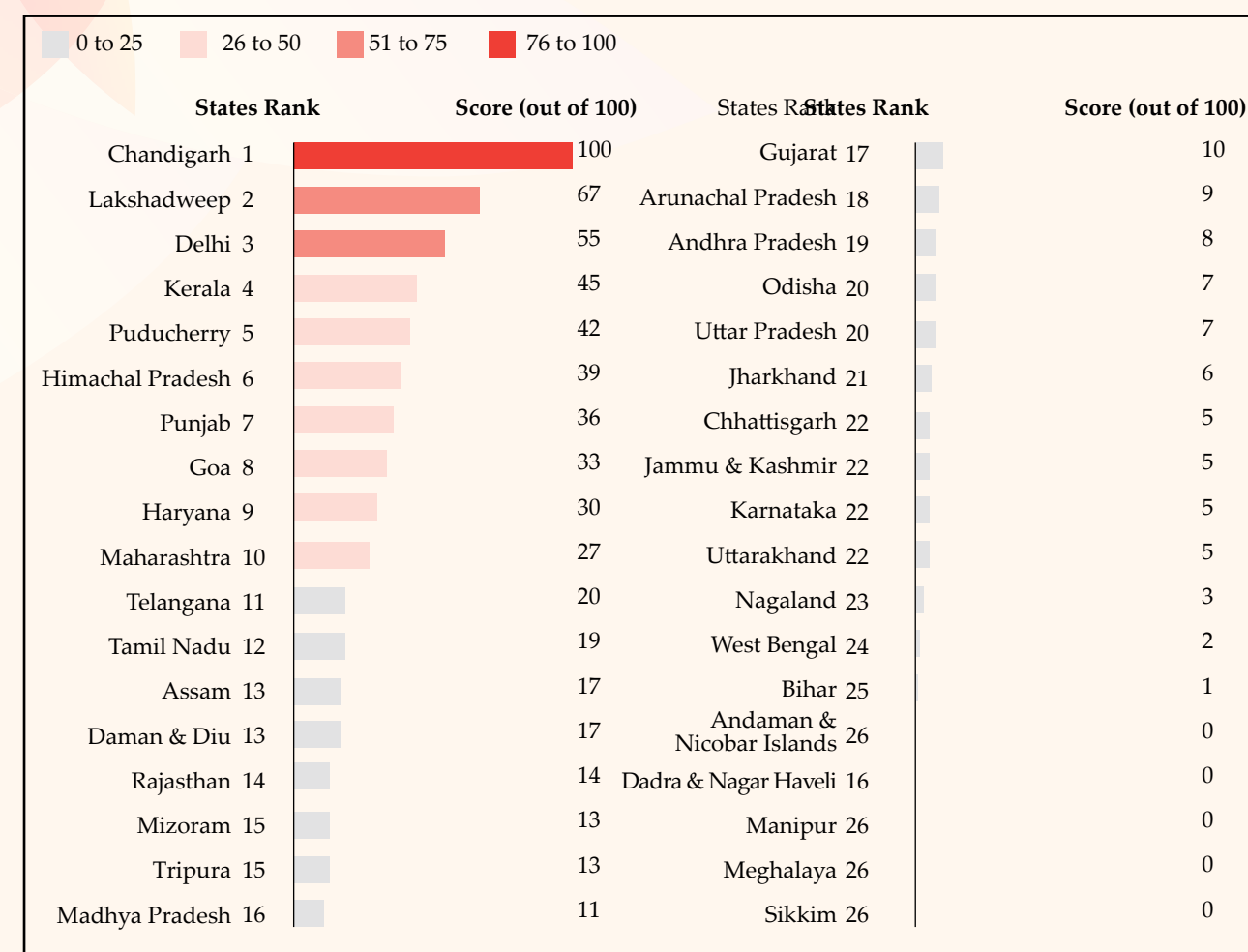


Fig. Barrier Free Access Ranking (From Building Better Courts: Surveying the Infrastructure of India's District Courts by Vidhi Centre for Legal Policy)

In the USA, the Courthouse Access Advisory Committee set up by the U.S. Access Board, under the Americans with Disabilities Act and the Architectural Barriers Act has continued to develop and disseminate guidance on accessible courthouse design.⁴⁹ In India, however, no regular periodic audit or review of court infrastructure is undertaken at the state and district level by any government or judicial authorities. The NCMS Report is dated. Indian Courts, therefore, might benefit from setting up committees modeled after the Courthouse Access Advisory Committees to periodically review and provide guidance on accessible designs.

49 See <https://www.access-board.gov/files/advisory-committee-reports/caac-report.pdf>

2.3 Some Best Practices for Accessibility and Inclusion

A 3-judge bench of the Supreme Court recently⁵⁰ upheld reasonable accommodation for persons with disabilities and held that the denial of reasonable accommodation constitutes disability-based discrimination under Section 3 of the RPD Act.

The Constitutional Court of Colombia (Decision T-573/2016) and the Supreme Court of Mexico (Resolución Judicial de la Primera Sala de la Suprema Corte de la Nación en el Amparo en Revisión 159/2013) called for the translation of judgments concerning the rights of persons with disabilities into easy read formats for the benefit of the petitioners and other persons with intellectual disabilities.

In South Africa, the case of W B Bosch was ground-breaking in terms of ensuring accessibility of police stations. Mr. Bosch challenged the lack of access to a police station as a wheelchair user. The court ruling required the police station to ensure accessibility and in the meantime move the police officers to the ground floor. As a consequence of this precedent about 150 other police stations underwent reconstruction to ensure accessibility.

In the Democratic Republic of Congo, mobile courts bring a measure of justice and dignity to victims of sexual and gender-based violence including disabled victims, who might otherwise be unable to access a courthouse.

E-Kiosks: Kiosks in Jharkhand and Chhattisgarh were established by One World Foundation India under the Nyaya Path initiative of the Department of Justice. Voice-based legal information kiosks were setup in the two states to spread awareness about legal entitlements in twelve key areas including women's rights, child rights, rights of persons with disabilities, rights of labourers, rights of Dalit and Adivasi communities, Right to Information Act, PRI system, NREGA, free legal aid entitlements, information on duties and responsibilities of the police and consumer rights.

Tele-Law⁵¹: In April 2017, the Hon'ble Minister of Law and Justice launched the Tele-Law Programme that primarily aims to address issues at the pre-litigative stage. It digitally connects marginalized and poor people with panel lawyers, to seek legal advice and consultation through the use of video conferencing and telephone service available at the Common Services Centers situated at the gram panchayat level. Tele-Law means the use of communications and information technology for the delivery of legal information

⁵⁰ Vikash Kumar v UPSC See https://main.sci.gov.in/supremecourt/2019/19177/19177_2019_36_1503_26115_Judgement_11-Feb-2021.pdf

⁵¹ <https://doj.gov.in/access-to-justice/scheme>

and advice. This e-interaction between lawyers and people takes place through the video-conferencing infrastructure available at the CSCs. PwD has been included as an eligible category who can avail of this service.

Website Accessibility for PWD: People with disabilities face unnecessary barriers with poorly designed websites, just as they face barriers with poorly designed buildings. The *ADA Best Practices Tool Kit for State and Local Governments*⁵² identifies some common problems with website accessibility for the disabled person and also provides their solution. Some of these are provided below:

Problem	Solution
Images Without Text Equivalents	Add a Text Equivalent to Every Image Adding a line of simple HTML code to provide text for each image and graphic will enable a user with a vision disability to understand what it is. Add a type of HTML tags, such as an "alt" tag for brief amounts of text or a "longdesc" tag for large amounts, to each image and graphic on your agency's website. The words in the tag should be more than a description. They should provide a text equivalent of the image. In other words, the tag should include the same meaningful information that other users obtain by looking at the image. In the example of the mayor's picture, adding an "alt" tag with the words "Photograph of Mayor Jane Smith" provides a meaningful description.
Documents Are Not Posted In an Accessible Format	Post Documents in a Text-Based Format Always provide documents in an alternative text-based format, such as HTML or RTF (Rich Text Format), in addition to PDF. Text-based formats are the most compatible with assistive technologies.
Specifying Colors and Font Sizes	Avoid Dictating Colors and Font Settings Websites should be designed so they can be viewed with the color and font sizes set in users' web browsers and operating systems. Users with low vision must be able to specify the text and background colors as well as the font sizes needed to see webpage content.

⁵² See <https://www.ada.gov/pcautookit/abouttoolkit.htm>

Videos and Other Multimedia Lack Accessible Features	Include Audio Descriptions and Captions Videos need to incorporate features that make them accessible to everyone. Provide audio descriptions of images (including changes in setting, gestures, and other details) to make videos accessible to people who are blind or have low vision. Provide text captions synchronized with the video images to make videos and audio tracks accessible to people who are deaf or hard of hearing
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It also identifies other good practices while developing a website:

- G include a “skip navigation” link at the top of webpages that allows people who use screen readers to ignore navigation links and skip directly to webpage content;
- G minimize blinking, flashing, or other distracting features;
- G if they must be included, ensure that moving, blinking, or auto-updating objects or pages may be paused or stopped;
- G design online forms to include descriptive HTML tags that provide persons with disabilities the information they need to complete and submit the forms;
- G include visual notification and transcripts if sounds automatically play;
- G provide a second, static copy of pages that are auto-refreshing or that require a timed response;
- G use titles, context, and other heading structures to help users navigate complex pages or elements (such as webpages that use frames).

2.4 Intersectionality and Access to Justice

Courts need to be sensitive to questions of intersectionality in administrative as well as judicial roles. For example, it has been repeatedly demonstrated that women and girls with disabilities in India who survive sexual violence face high barriers to access the justice system. A Report by Human Rights Watch titled “Invisible Victims of Sexual Violence: Access to Justice for Women and Girls with Disabilities in India,” details the challenges many women and girls with disabilities face throughout the justice process: reporting abuse to the police, obtaining appropriate medical care, having complaints investigated, navigating the court system, and getting adequate compensation.

The Supreme Court recently in a judgment (*Patan Jamal Vali v State of Andhra Pradesh*) on sexual violence faced by disabled women, has laid down a series of guidelines to make the criminal justice system more disabled-friendly:

- The National Judicial Academy and state judicial academies are requested to sensitize trial and appellate judges to deal with cases involving survivors of sexual abuse. This training should acquaint judges with the special provisions, concerning such survivors, such as those outlined above. It should also cover guidance on the legal weight to be attached to the testimony of such witnesses/survivors, consistent with our holding above. Public prosecutors and standing counsel should also undergo similar training in this regard. The Bar Council of India can consider introducing courses in the LL.B program that cover these topics and the intersectional nature of violence more generally;

Trained special educators and interpreters must be appointed to ensure the effective realization of the reasonable accommodations embodied in the Criminal Law Amendment Act, 2013. All police stations should maintain a database of such educators, interpreters and legal aid providers, to facilitate easy access and coordination;

- The National Crimes Record Bureau should seriously consider the possibility of maintaining disaggregated data on gender-based violence. The disability must be one of the variables based on which such data must be maintained so that the scale of the problem can be mapped out and tailored remedial action can be taken;
- Police officers should be provided sensitization, regularly, to deal with cases of sexual violence against women with disabilities, in an appropriate way. The training should cover the full life cycle of a case involving a disabled survivor, from enabling them to register complaints, obtain necessary accommodations, medical attention and suitable legal representation. This training should emphasize the importance of interacting directly with the disabled person concerned, as opposed to their care-taker or helper, in recognition of their agency; and
- Awareness-raising campaigns must be conducted, in accessible formats, to inform women and girls with disabilities, about their rights when they are at the receiving end of any form of sexual abuse.

A recent report⁵³ by the Centre for Law and Policy Research examining the intersectionality of caste, disability, sex, gender and gender identity in the four states- Tamil Nadu, Andhra Pradesh, Karnataka, and Kerala demonstrated that aggravated forms

53 See A Report on Discrimination Based on Caste with the intersections of Sex, Gender Identity and Disability in Karnataka, Andhra Pradesh, Tamil Nadu and Kerala available at <https://clpr.org.in/wp-content/uploads/2019/08/Intersectionality-A-Report-on-Discrimination-based-on-Caste-with-the-intersections-of-Sex-Gender-Identity-and-Disability-in-Karnataka-Andhra-Pradesh-Tamil-Nadu-and-Kerala.pdf>

of discrimination are faced by those who fall at the intersections of multiple marginalised identities. For example, the study showed that 67% of Dalit persons with disabilities faced difficulties in accessing facilities in schools, such as toilets, 52% of Dalit respondents with disabilities were unemployed at the time of the survey and 21% highlighted the lack of accessible workspaces, 23% Dalit persons with disabilities reported that they were denied medical treatment, and over 70% of Dalit persons with disabilities said they faced difficulty in accessing government offices and public transportation facilities. The Report highlighted that the existing laws on caste, disability and gender discrimination are not adequate to deal with the forms of discrimination faced by people in their daily lives because *these legislations do not tackle the compounded intersectional discrimination and violence that people at the intersections of caste, gender and disability face.*

The Report also found that obligation to make reasonable accommodations for persons with disabilities has not been rigorously extended to private organisations under the Rights of Persons with Disabilities Act, 2016 (RPD Act), which poses an additional challenge to integrating persons with disabilities into the workforce.

2.5 Special Courts and Special Public Prosecutors

2.5.1 Section 84 of the RPD Act states that -- “For the purpose of providing speedy trial, the State Government Shall, with the concurrence of the Chief Justice of the High Court, by Notification, specify in each District, a Court of Session to be Special Court to try the offences under this Act.” Thus, Section 84, along with Section 12 of the Act creates the larger framework to enable people with disabilities to approach the court in case of infringement of their rights and to achieve speedy justice.

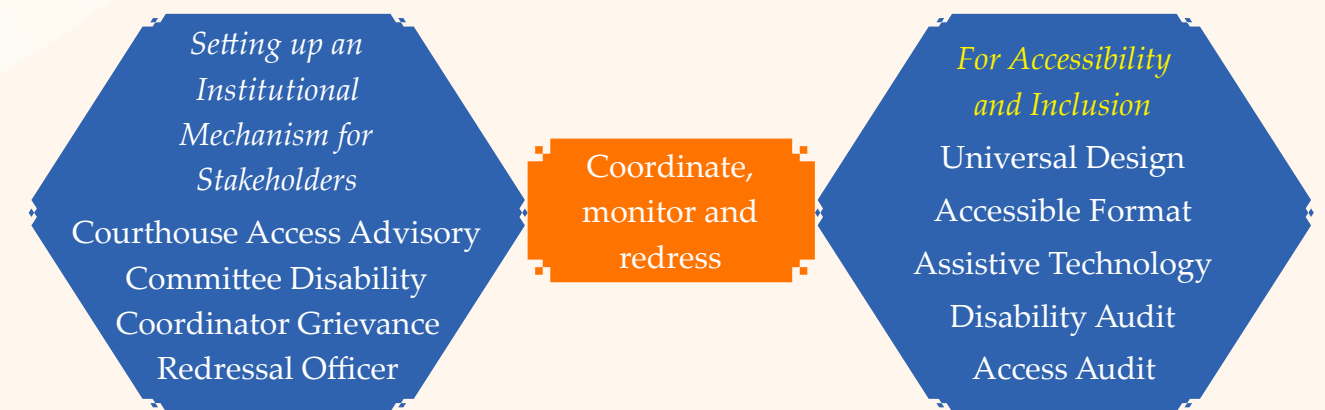
2.5.2 As per Section 85, for every Special Court, the State Government should specify a Public Prosecutor or appoint an advocate who has been in practice as an advocate for not less than seven years, as a Special Public Prosecutor to conduct cases in that Court.

2.5.3 However, according to a report by *Diversity and Equal Opportunity Centre*⁵⁴ in 2018, on the status of the RPD Act, only 10 states (41.7%) have notified Special Courts in the Districts to try offences under the Act and only 3 States have appointed Special Public Prosecutors/advocate. The purpose of special Courts in each district and appointing Special Public Prosecutor for the same was to

make access to justice for disabled people an easier process. Under the old law, a person had to go to the State Commissioner located in the State Capital to lodge a complaint.

3. Action Plan

Roadmap for Inclusive and Accessible Court



Roadmap for the Subcommittee



54 See <https://www.deoc.in/wp-content/uploads/2018/12/Report-of-Status-of-RPWD-Act-Final.pdf>

4. Conclusion

4.1 Infrastructure Accessibility

(INCLUDES PHYSICAL, PERSONNEL AND DIGITAL/TECHNOLOGICAL INFRASTRUCTURE)

- (i) **Universal Design:** Department of Justice should conceptualise a scheme for renovation and maintenance of older, existing court complexes, to align with Universal Design principles. These principles, developed in 2011 through the joint effort of architects, academicians, and disability rights activists, are design guidelines to enable seamless access to any building regardless of age, gender or disability of any person.
- (ii) **Judicial Performance Index:** Judicial Performance index ought to keep track of accessible facilities and reasonable accommodations provided to persons with disabilities in different cases/judicial proceedings at the Supreme Court, High Courts & District Courts.
- (iii) **Special Courts:** Setting up of Special Courts in accordance with Section 84 of the RPD Act, which provides a framework to enable people with disabilities to approach the Special Court in case of infringement of their rights and to achieve speedy justice.
- (iv) **Accessibility in Peripheral Legal and Quasi-Judicial Authorities:** In peripheral legal and quasi-judicial authorities (e.g. Police, Commissioners in different sectors, Labour courts, family courts, etc.) accessibility is virtually absent. All legislative, administrative and operational reforms with respect to these shall include provisions for accessibility, reasonable accommodations and awareness about the same to persons with disabilities. Such authorities should be sensitised about the issues, requirements and reasonable accommodations to be provided to persons with disabilities with respect to any police / legal interventions. Awareness should also be raised among persons with disabilities about the procedures and reasonable accommodations available for persons with disabilities with respect to the police force.
- (v) **Grievance Redressal Officer:** Appointment of a Grievance Redressal Officer at the Supreme Court, High Courts, and District Courts.
- (vi) **Disability Coordinator:** Each court should also designate a disability coordinator to handle requests for accommodations, including auxiliary aids and services, offer training and provide educational materials to judges, magistrates, commissioners, court administrators and court personnel regarding communication access.

- (vii) **Overcoming Attitudinal Barrier:** Attitude, knowledge and awareness of stakeholders in the justice delivery system including police officers, lawyers, judges, court staff and others on how to accommodate persons with disabilities and make justice more accessible and inclusive is extremely important. This can only be achieved by awareness training and capacity building among all stakeholders in law enforcement and justice sector.⁵⁵ Needless to assert, training programs ought to be developed in close collaboration with persons with disabilities and groups working on disability rights and implemented through the National Judicial Academy and State Judicial Academies.
- (viii) **Courthouse Accessible Advisory Committees:** Setting up of Courthouse Accessible Advisory Committees with members having diverse expertise and experience at the level of the Supreme Court, High Courts and Tribunals to provide effective strategies and solutions for integrating accessibility into the design of courthouses and periodically review barriers to accessibility in the administration of justice at the institutional level for persons with disabilities.
- (ix) **Accessible Formats:** All those departments/ offices in courts where documents are to be filed, registered or stored should have the equipment to ensure that processes like filing, storing and referring could be done through accessible formats. This means that all documents should be accessed in audio/braille format by people with visual/hearing impairments, sign language and interpretation for deaf and persons hard of hearing, easy read or video guides for persons with psychosocial or intellectual disabilities.
- (x) **Auxiliary Aids:** Create a uniform policy for providing auxiliary aids and services to court participants throughout the court system and post the rule or policy on the Supreme Court website in an easy-to-find location.
- (xi) Provide a visual method of calling individuals who are deaf or hard of hearing in the courthouse/courtroom.
- (xii) Install visual alarms in hallways, restrooms, lobbies, courtrooms, and waiting areas.
- (xiii) Maintain an adequate supply of readily available interpreters capable of appearing in an expedited manner with little advance notice.
- (xiv) **Periodic Audit of Infrastructure:** No regular periodic audit or review of court infrastructure is undertaken at the state and district level by any government or judicial authorities. The NCMS Report is substantially dated. Courts therefore might benefit from setting up committees modeled after the Courthouse Access Advisory

⁵⁵ <https://www.un.org/esa/socdev/documents/disability/Toolkit/Access-to-justice.pdf>

Committees in the USA to periodically review and provide guidance on accessible designs.

- (xv) **Disability Audit:** Currently there is no data around the numbers of disabled persons in the court ecosystem, including court staff, judges, lawyers and litigants. Without this data, the requirements of PwD coming to contact with courts cannot be assessed properly.

4.2 Sensitisation of Judiciary

The disability justice framework calls for an intersectional framework of understanding disability rights where disability is not merely an isolated category of exclusion, but a product of multiple intersectional identities like race, class, caste, sex, gender, sexuality and disability. Courts need to be sensitive to questions of intersectionality in administrative as well as judicial roles.

- The National Judicial Academy and state judicial academies should sensitize trial and appellate judges to deal with cases involving survivors of sexual abuse. This training should acquaint judges with the special provisions, concerning such survivors, such as those outlined above. It should also cover guidance on the legal weight to be attached to the testimony of such witnesses/survivors, consistent with our holding above. Public prosecutors and standing counsel should also undergo similar training in this regard. The Bar Council of India can consider introducing courses in the LL.B program that cover these topics and the intersectional nature of violence more generally. (Pursuant to Guidelines laid down by the Hon'ble Court in *Patan Jamal Vali v State of Andhra Pradesh*)
- Police officers should be provided sensitization on a regular basis, to deal with cases of sexual violence against women with disabilities, in an appropriate way. The training should cover the full life cycle of a case involving a disabled survivor, from enabling them to register complaints, obtain necessary accommodations, medical attention and suitable legal representation. This training should emphasize the importance of interacting directly with the disabled person concerned, as opposed to their care-taker or helper, in recognition of their agency (Under Guidelines laid down by the Hon'ble Court in *Patan Jamal Vali v State of Andhra Pradesh*)
- **Dismantling the Incapacity Regime:** Legal presumption of incapacity is a formidable barrier while accessing justice. Criminal law has been changed from “unsound mind” to “mentally ill person” without however, dismantling the incapacity regime.

4.3 Policy Consideration

- a. **CPC and CrPC:** Existing laws should be reviewed and brought in line with the RPD Act. For example, The Code of Civil procedure and The Code of Criminal procedure must be reviewed and amended for inclusion of additional reasonable accommodations measures to facilitate the fair trial of persons with disabilities.
- b. **Consumer Protection:** Disability activists⁵⁶ have been demanding that all laws and rules on consumer protection like the Consumer Protection Act 1986 must be reviewed and amended as per the provisions and spirit of RPWD Act 2016 and UNCRPD. Right to accessibility should be included as a consumer right, which ensures goods and services with accessibility features. There should be clear guidelines so that information may be organised into in easy, standardised and accessible formats. All consumer courts should be immediately audited for accessibility and all online forums on information, grievance handling must comply with Web Content Accessibility Guidelines standards.
- c. Awareness-raising campaigns must be conducted, in accessible formats, to inform women and girls with disabilities, about their rights when they are at the receiving end of any form of sexual abuse.
- d. **NCRB Data on Disability:** National Crime Records Bureau (NCRB) must maintain data on the violent crimes committed against persons with disabilities. The United Nations committee monitoring the implementation of the U.N. Convention on Rights of PwD had recommended to the government in September 2019 to ensure that the NCRB collected disaggregated data by sex, age, place of residence, relationship with perpetrator and disability in case of violence and exploitation of women and girls with disabilities. The National Human Rights Commission too had recommended recently that the NCRB should maintain data on PwD
- e. **Disaggregated Data on GBV:** In *Patan Jamal Vali v State of Andhra Pradesh*, the Supreme Court has strongly urged that the National Crimes Record Bureau should consider the possibility of maintaining disaggregated data on gender-based violence. Disability must be one of the variables based on which such data must be maintained so that the scale of the problem can be mapped out and tailored remedial action can be taken.

⁵⁶ See for example Disability Inclusion in NITI Aayog's Three Year Action Agenda by National Committee on the Rights of Persons with Disabilities (NCRPD) - a disability think tank set up by National Centre for Promotion of Employment for Disabled People (NCPEDP)

D. CASTE



1. Introduction

The first challenge that we face in extending access to justice towards marginalized castes is to define the category of caste itself. When it comes to caste, there is no disagreement over the existence of a hierarchical and stratified caste order that pervades Indian society. However, there is no universally accepted definition of the term 'caste'. In fact, the word 'caste' is a European term that was used by 16th-century Portuguese travellers – who used their term for clan 'casta' to describe outsiders.⁵⁷

In Hindu texts, the term caste is associated with *varna*. The varna system was the organisation of the society into four hierarchical categories: priests (brahmins); kings and warriors (kshatriyas), farmers and merchants (vaishyas); labourers (shudras) and the fifth group of "untouchables" who were completely excluded from the system. The hierarchy in the caste system depends on the level of purity and pollution. To ensure purity, social intercourse between different castes from family life to dining is regulated by norms. Being born into a particular caste ascribes a certain level of purity or impurity to an individual. On the two extremes are the Brahmins (the purest) and the untouchables, the outcastes, with whom a minimum or no contact must be maintained to avoid the pollution of ritualistic purity⁵⁸. This notion underlies the practice of untouchability which has been abolished under the Constitution.

The lived experience of caste occurs in the form of '*jatis*'. These *jatis* can be defined as endogamous groups which are based on heredity. The "*caste system*," according to Grinsell, "in its present form does not establish merely a hierarchy of groups in society, but also a system of political authority with formal terms of membership. One's particular caste is a form of identity, and also an affiliation to a community-with some elements of sovereignty-that has limited authority to establish its system of governance."⁵⁹ The *jati* governs, *inter alia*, one's occupational status, likelihood of property ownership, social and religious practices, style of dressing and gender norms.

However, placing the *jatis* within the *varna* system can be complicated because multiple sub-classifications exist in each region and there may be local criteria for ranking *jatis*. There may be variations in each region in relation to rank orderings, conflicts over the rank and the existence of factors that may even change these ranks. Thus, it is hard to establish a pan

⁵⁷ Shareen Joshi Nishtha Kochhar and Vijayendra Rao, Are Caste Categories Misleading? The Relationship Between Gender and Jati in Three Indian States, <https://oxford.universitypressscholarship.com/view/10.1093/oso/9780198829591.001.0001/oso-9780198829591-chapter-16#oso-9780198829591-chapter-16-note-271>

⁵⁸ Diana Mickeviciene, Concept of Purity in the Studies of Indian Caste System, *Acta Orientalia Vilnensia*, Vol. 4 (2003), p. 239–254.

⁵⁹ Scott Grinsell, Caste and the Problem of Social Reform in Indian Equality Law, *Yale Journal of International Law*, Vol. 35 (2010) at 205

India system of rankings.⁶⁰ While there may be fluidity and regional differences between caste orderings, there are established ruling castes who can be distinguished from other 'inferior' groups. In ruling castes, endogamy is more pronounced, and a certain privilege accrues to the members of such castes by inheritance. There is typically a large difference in standards of living and representation in important public offices and institutions between ruling castes and inferior castes.⁶¹ While the Brahmins occupy a position of dominance according to the scriptures, certain non-Brahmin upper castes also exercise political power, authority and claim prestige depending on local conditions.⁶²

In addition to castes that are treated as untouchable or suffer low levels of educational and social advancement, there are tribal groups that suffer backwardness due to their social, spatial and cultural isolation from the majority of the society. While the identification of marginalised castes has been a difficult exercise due to regional variations and debates over criteria to be used, the designation of these tribal groups has been easier as they share distinct tribal characteristics and are isolated from the society. However, often it is not easy to draw the line between tribal and non-tribal groups. There are also overlaps with caste order and difficulties in ascertaining whether a particular group should be classified as a tribe or a caste.⁶³

1.1 Effect of the Colonial Rule

Commentators have noted that in a bid to stabilise the 18th-century Indian rural society, which was highly mobile, into settled village communities, to maximise revenue extraction, the British colonial state ended up strengthening the rigidity and hierarchy of the caste system and dominance of the Brahmins. The theoretical elements of the caste system were not necessarily followed in social practice. However, the bookish approach of the early British oriental scholarship was biased towards studying the higher elements of Hinduism rather than the flexible cultural practices. Thus, this paved way for the solidification of caste categories. Further, the censuses conducted by the British contributed to the social engineering of the society through rigid classification of social identities.⁶⁴ As a result, caste identification and stratification became more pronounced. On the other hand, the recognition of oppressed caste groups by the State led to political mobilisation within communities and greater demands for their political representation and social

⁶⁰ Supra note 1.

⁶¹ Subedi Madhusudan, *Caste in South Asia: From Ritual Hierarchy to Politics of Difference*, Politeja, Vol. 40 (2016), p. 319–40.

⁶² Kalpana Kannabiran, *Sociology of Caste and the Crooked Mirror, Recovering BR Ambedkar's Legacy*, EPW, Vol. 44 (2009), available at <https://www.epw.in/journal/2009/04/perspectives/sociology-caste-and-crooked-mirror-recovering-b-r-ambedkars-legacy.html>

⁶³ Marc Galanter, *Competing Equalities: Law and Backward Classes in India*, University of California Press (1992), Chapter on Identifying the Beneficiaries.

⁶⁴ Sugata Bose and Ayesha Jalal, *Modern South Asia: History, Culture, Political Economy*, Routledge (2011), p.8.

welfare.

The 1931 census conducted by the colonial government examined India through the prism of caste and community dimensions and is a significant document as it was, arguably, the last time that a census had so overtly "objectified"/"classified" people on the basis of caste.⁶⁵ This census formed the basis of promulgating the Government of India Act, 1935, which was the first act that reserved seats for "depressed classes" (untouchables) in the bicameral legislature at the center, when the Act was implemented in 1937. These "depressed classes" later came to be known as the Scheduled Caste.

Marc Galanter highlights identification of depressed classes, the untouchables, who are now categorised as Scheduled Castes, was a fraught exercise for the colonial government. The initial trouble that they faced was whether the criteria for the determination of depressed classes should be a ritual or a social exclusion or more generally their low status in the society. The practices of touch and distance pollution in Madras and Bombay Presidencies and Central Provinces were fairly uniform and there was little debate on who constituted the 'untouchables', however, in northern and eastern India, the practices were not uniform and theoretical untouchability did not always translate into actual untouchability – for example in terms of exclusion from schools and access to wells. J. H. Hutton, the Census Commissioner for the 1931 census came up with elaborate criteria to classify untouchable groups which primarily relied on the test of whether the caste or class in question has the right to use public conveniences. However, flexibility was given for regional variations, where provincial superintendents were allowed to create their own list of depressed classes based on the criteria set by Hutton. A list of untouchable groups was promulgated in 1936, which was used to give effect to the provisions of special electoral representation under the Government of India Act, 1935.⁶⁶

In 1935 the colonial government also identified 'Schedule of Tribes,' which comprised of different indigenous tribal groups i.e., de-notified tribes, criminal tribes, forest dwellers, etc. With respect to Schedule Tribes, the colonial government's policy was to protect "aboriginal people" from exploitation by outside groups and excluded areas and partially excluded areas were notified under the Government of India Act, 1935 for this purpose. The colonial government also adopted a policy for their advancement by making special provisions for their representation in Provincial Legislatures.⁶⁷

⁶⁵ Timothy L Allen, *Age and Empire in the Indian Census, 1871-1931*, *Journal of Interdisciplinary History* (1999), available at <https://www.lehman.cuny.edu/academics/arts-humanities/documents/AHALBJIH.pdf>

⁶⁶ Supra note 7.

⁶⁷ Ibid

1.2 The Independent Indian State

One of the first tasks taken up by the Constituent Assembly (“CA”) in drafting the Constitution, was the dissolution of the caste system. The CA realized that a legal prohibition against discrimination and ensuring formal equality would not suffice and India needs “a more aggressive commitment to social reform that aimed to completely restructure society in pursuit of a complete abolition of the ancient hierarchies that they saw pervading, and crippling, Indian communities.”⁶⁸ The Constitution identified three groups who were eligible for reservation and special treatment for their advancement. These were the (i) Scheduled Castes; (ii) Scheduled Tribes; and (iii) socially and educationally backward classes.

In terms of classification of Scheduled Castes, the framers of the Constitution did not attempt to define untouchability or a standard criterion for defining these groups apart from a broad understanding that these castes or classes were untouchables.

They instead provided a procedure for designating such groups as Scheduled Castes which are state-specific. Under Article 341 of the Constitution, as it stands today, the President after consulting with the Governor of the State may specify “specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that State.” Only the Parliament has the authority to include or exclude groups from this list. The Scheduled Caste list promulgated by the President in 1950 was in effect the list prepared in 1936 by the colonial government with the addition of four Sikh castes. The selection of Scheduled Castes has proceeded on the basis of “untouchability” resulting in incidental social disabilities. The criteria have been supplemented “in varying degrees with economic, occupational, educational, and [...] residential and religious tests.”⁶⁹ One issue that crops up in relation to identification is the spatial movement of the members of these groups, which has not been sufficiently addressed. A caste may be designated as Scheduled Caste in one state but may not qualify for that category in another state.⁷⁰ Another issue that arises is that the Presidential Order of 1950 limited the classification of Scheduled Castes to Hindus, Sikhs and Buddhists and leaves out those Dalits who have converted to Islam or Christianity.

The Indian Government carried forward the colonial policy instituted in 1935 of protection and advancement of Scheduled Tribes. The President has been given similar powers to specify Scheduled Tribes as have been given in the case of Scheduled Castes, under Article 342 of the Constitution. Scheduled Tribes have been given administrative autonomy

over Scheduled Areas (Articles 244 and 244A) with overriding control of the union over the administration of such areas (Article 339). The Constitution provides reservation for Scheduled Castes and Scheduled Tribes in matters of political participation (Articles 330, 332 and 243D), public educational institutions (Article 15) and public employment (Article 16). Marc Galanter notes that Scheduled Tribes have been “defined partly by habitat and geographic isolation, but even more on the basis of social, religious, linguistic, and cultural distinctiveness – their tribal characteristics”.⁷¹

The court’s jurisprudence in defining the Scheduled Castes and Scheduled Tribes has been limited. Courts have attempted to define untouchability within the context of Article 17 of the Constitution which prohibits untouchability. The Mysore High Court stated that untouchability under Article 17 “refers to those regarded as untouchables in the course of historical development” and have been relegated “beyond the pale of the caste system [...] on the ground of birth in certain classes.” Justice Thommen in *Indira Sawhney & Ors. v. Union of India*⁷² observed that poverty is not sufficient cause for designation as Scheduled Caste or Scheduled Tribe, at the same time, membership of a particular caste is also not enough. He stated that the, “..question to be asked, for reservation, is whether such poverty is the result of identified historical or continuing discrimination. No matter what caused the discrimination and exploitation; the question is, did such inequity and injustice result in poverty and backwardness.”⁷³ Recently, the Supreme Court in *Union of India v. State of Maharashtra and Ors.*⁷⁴ has observed that Scheduled Castes and Scheduled Tribes “remain unequal and vulnerable section of the society. The classes of Scheduled Castes and Scheduled Tribes have been suffering ignominy and abuse, and they have been outcaste socially for centuries (emphasis added).”

The socially and educationally backward classes are provided reservation in admission to public educational institutions and public services. The backward classes in the words of CA member, KM Munshi, were those people who are “touchable or untouchable, belonging to this community or that, who is so backward that special protection is required in the services”.⁷⁵ The Constitutional design envisioned that such backward classes are to be designated at the local level. The President was given the duty of appointing the Backward Classes Commission to investigate the conditions of backward classes under Article 340 of the Constitution. Marc Galanter has observed that “what emerges from the interaction of state governments, commissions, and courts are lists of communal groups,

⁷¹ Ibid

⁷² 1992 Supp (3) SCC 217

⁷³ Ibid at 438.

⁷⁴ (2020) 4 SCC 761.

⁷⁵ KM Munshi at VII CAD 687.

⁶⁸ Supra note 3.

⁶⁹ Supra note 7.

⁷⁰ Ibid

with some admixture of geographic and income factors, chosen on the basis of low status, low educational attainments, and poverty [...] the lists tend to converge on something like the second and third lowest quintiles of the population – in terms of traditional status – assuming the Scheduled Castes and Tribes make up the lowest quintile.” In constitutional litigation, there has been much debate over how backward classes are to be identified – what emerges is that though caste and communal units may be used for ascertaining backward classes and can be one of the tests to establish backwardness, caste or communal rank or status cannot be the sole or exclusive criteria to assess backwardness.⁷⁶

The Supreme Court judgment in *Indira Sawhney-II*⁷⁷ has held that the creamy layer of the socially and educationally backward classes will not be eligible for reservation. The Supreme Court in *Jarnail Singh v. Lacchmi Narain Gupta*⁷⁸ extended the concept of creamy layer to Scheduled Castes and Scheduled Tribes. Justice Jeevan Reddy in *Indira Sawhney-II* had clarified that “the basis of exclusion [of creamy layer] should not merely be economic, unless, of course, the economic advancement is so high that it necessarily means social advancement.” The Supreme Court recently in *Pichra Warg Kalyan Mahasabha v. State of Haryana*⁷⁹ has emphasised that economic criteria cannot be the exclusive basis for ascertaining the creamy layer. Factors such as, inter alia, employment in high governmental posts, persons having agricultural holdings or receiving income from properties, beyond a stipulated limit, would not be entitled to the benefit of reservations. Presently, creamy layer exclusion applies if the family income is more than 8 lacs. Similarly, inter alia, children of civil servants or those holding comparable positions in PSUs also fall in the creamy layer.⁸⁰

1.3 CREAMY LAYER

The creamy layer means those people who occupy the top position in a community's socio-economic hierarchy. There is much debate over whether an economic advantage mitigates against societal discrimination, especially in the case of Scheduled Castes and Scheduled Tribes, and ensures fair representation of marginalised castes in legislatures, educational institutions and legislatures. It has also been questioned whether the poorer members of these marginalised groups are deprived of opportunities because of the more advantaged members when many of the reserved seats in educational institutions go empty.⁸¹

⁷⁶ Supra note 7.

⁷⁷ AIR 2000 SC 498

⁷⁸ SLP (C) No 30621 of 2011

⁷⁹ WP (C) No. 60 of 2019

⁸⁰ Ministry of Personnel on Reservation for Candidates from Other Backward Classes, available at <http://www.ncbc.nic.in/Writereaddata/DoPTOM08.06.2018.pdf>

⁸¹ Shoaib Daniyal, Explainer: What is 'creamy layer' and why applying it to caste reservation is controversial, Scroll, 6 October 2018, available at <https://scroll.in/article/896276/explainer-what-is-creamy-layer-and-why-applying-it-to-caste-reservation-is-controversial>; Also see, Gautam Bhatia, The Nagaraj Creamy Layer and its Discontents, Indian Constitutional Law and Philosophy, 30 September 2018, available at <https://indconlawphil.wordpress.com/2018/09/30/the-nagaraj-creamy-layer-judgment-and-its-discontents/>

Theories of intersectional discrimination highlight that there is a hierarchy within oppressed groups and policies of social advancement should not merely address the claims of the most privileged within that group and ensure that the benefits reach the lowest strata. The Supreme Court in *Patan Jamal Vali v State of Andhra Pradesh*⁸², in a case of rape of a blind Scheduled Caste woman, observed that “[m]ost political liberation struggles have been focused on a sole characteristic like anti-caste movements, movements by persons with disabilities, feminism and queer liberation. Many such movements have not been able to adequately address the intra-group diversity leading to a situation where the needs of the relatively privileged within the group have received more than a fair share of the spotlight. When these liberation struggles were adopted in law, the law also developed into mutually exclusive terrains of different statutes addressing different marginalities failing to take into account the intersectional nature of oppression.” Thus, it should be borne in mind that while economic advancement alone cannot militate against social disadvantage, there are members of oppressed groups who suffer on account of multiple marginalisation which may include class, sexual orientation, gender and disability.

1.4 Social Movements against the Caste System

It is also important to note the challenges that emerged against the caste system. One of the early challenges to the caste system arose from Buddhism and Jainism which questioned Brahmanical supremacy and the caste system. In the 6th century, Bhakti movement rejected Brahmanism in favour of direct communion with God.

During the colonial era, Rammohun Roy created the Brahmo Samaj which renounced the caste system and idolatry. Jyotibha Phule and Savitribai Phule, who themselves suffered caste-based discrimination, together under the aegis of Satyashodhak Samaj emphasised on the education of Dalits and women in Maharashtra and recognition of their social rights. Birsa Munda, a leader and folk hero of the Munda Tribe spearheaded a movement against the British, founded his own religion and fought against encroachment of tribal land by outsiders.⁸³ Periyar emerged as the foremost critic of Brahmanical dominance and gender and caste inequality in Tamil Nadu. BR Ambedkar represented the marginalised caste, especially the untouchables, during the colonial era and is credited to be the chief architect of the Indian Constitution.

⁸² Criminal Appeal No 452 of 2021

⁸³ Remembering Birsa Munda, the Social Reformer and Revolutionary Leader, The Wire, available at <https://thewire.in/history/birsa-munda-social-reformer-revolutionary-leader>

Post-independence, the Scheduled Castes or the Dalits organised themselves politically and found representation through their leaders. Political parties were also formed to represent the interest of Scheduled Tribes and other backward castes. Dalit Panthers movement also emerged for a brief period as a social, cultural and literary movement which then became political. It was started by young Dalit graduates who were frustrated by the pace of social and economic reform.

1.5 Caste and its Nomenclature

It will be useful to provide an overview of the nomenclature used in respect of the caste system. However, while definitions are indicative, the meanings are not always completely stable and are subject to contestations and revisions.

Term	Meaning
Varna	Under Hindu scriptures, varnas are social classes that are hierarchically arranged on the basis of their occupation. The concept is typically attributed to Purusha Sukta verse in the Rig Veda. The varna system, not only creates division in terms of labour, but it also ranks the persons in terms of the labour that they do. There are four varnas. Dr. BR Ambedkar in Annihilation of Caste has highlighted that for all practical purposes, varna and caste/jati function in the same manner, that is they impose restrictions on inter-caste marriages and inter-dining.
Shudras	Shudras are the lowest of the four varnas. According to scriptures, they provide labour and service to other highly-ranked varnas. Outcastes or untouchables, who are beyond the pale of the varna system are often also absorbed into the Shudra class.
Swarn/Savarna/ Dvija	Swarn, Savarna and Dvija (twice-born) are used to refer to people belonging to upper castes.

Jati/caste	Jati is the colloquial term used to refer to caste. Jatis are social classes hierarchically ranked in Indian society. They are endogamous groups and association with a certain group is ascribed at birth which influences a person's social status and roles. It is often considered as an aberration of the varna system since birth defines the jati and social mobility is mostly restricted. Though some jatis, which had a low social status, have gained upward mobility through the process of Sanskritisation (a term coined by Indian sociologist, MN Srinivas), that is they have adopted the norms and practices of dominant jatis.
Harijan	Harijan (children of God) was a term coined by Mahatma Gandhi to refer to untouchables. The idea behind using the term Harijan was to avoid the usage of derogatory terms against lower caste groups. Many lower caste groups have however objected to the usage of the term even during Gandhi's lifetime because they found it condescending and believed that it instilled a sense of inferiority in the minds of the people for whom it was used. ⁸⁴
Depressed Classes	The legal term used by the colonial government to refer to 'untouchables'.
Scheduled Castes	Castes that are named in the list promulgated by the President under Article 341 of the Constitution. Consists of those castes that have faced social disability on account of their untouchability.
Scheduled Tribes	These tribes are specified by the President under Article 342 of the Constitution. Used to refer to indigenous tribal groups who due to their exclusion from the majority of the society face social backwardness.
Other Backward Classes	Other backward classes do not necessarily refer to caste groups. These are groups who are socially and educationally backward and caste may be one of the indicators of backwardness but cannot be the sole indicator.
Bahujan	Bahujan (majority of people) is an umbrella term that refers to Scheduled Castes, Scheduled Tribes and other backward or lower castes that are dominated by upper castes. Kanshi Ram, who founded the Bahujan Samaj Party, had also included Muslims within the category of Bahujans.

⁸⁴ Ramchandra Guha, The Rise and Fall of the Term 'Harijan', The Telegraph, 10 June 2017, available at <https://ramachandraguha.in/archives/the-rise-and-fall-of-the-term-harijan-the-telegraph.html>

Dalit	The term 'Dalit', popularised by Dalit Panthers, has been adopted by Scheduled Caste groups to provide a sense of pride and solidarity within the community since Scheduled Caste is only a legal designation given to the castes named in the list promulgated by the President under Article 341 of the Constitution. ⁸⁵
Adivasi	Adivasi, officially Scheduled Tribes, refers to various ethnic groups who are considered to be the original inhabitants of India.

2. Caste based discrimination and law enforcement agencies

The interrelationship between legal stakeholders, enforcement agencies and marginalised groups has in any case been a subject of intense scholarly scrutiny. Poor implementation of social welfare legislation often initiates a chain of interrelated events where the gaps (intentional or prejudicial) created by the enforcement agencies ultimately inflict more trauma on the interest groups who then further hesitate to claim their rights under the protective rubric of anti-discrimination laws. The anti-discriminatory legal framework ends up reinscribing structural inequalities.

For example, the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 is a pioneering example of progressive anti-discrimination legislation in India. Scholars have however indicated that this ambitious piece of social welfare legislation is limited by an assortment of factors, including poor understanding of the law and its implementation by law enforcement agencies including police and cultural practices in the courtroom that prejudicially impact interpretive exercises by the judiciary.

In fact, in 2004, India's National Human Rights Commission (NHRC), a statutory government body, characterized the law enforcement machinery as the greatest violator of Dalits' human rights. Similar sentiments have been expressed by other statutory bodies, NGOs and others in several reports, studies and documents. This chapter attempts to understand the relationship between law enforcement agencies and SC/ST groups by charting how both come in contact with each other, the regulatory framework that governs such interaction, and possible recommendations that could follow. Accordingly, the chapter is divided into four parts namely, first, constitutional and legal framework, second, rights of victims and witnesses, third, the response from police as law enforcement authority, fourth, accountability mechanisms and fifth, recommendations.

⁸⁵ Editorial, What's in a name? : on the use of the term 'Dalit', The Hindu, available at <https://www.thehindu.com/opinion/editorial/whats-in-a-name/article24875058.ece>

In preparing this chapter, several excellent reports prepared and submitted by various statutory bodies and organisations have been relied upon. These include Quest for Justice: Status Report on The Implementation of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989 and Rules 1995⁸⁶ by National Dalit Movement for Justice- NCDHR (2020), Report on Prevention of Atrocities against Scheduled Castes⁸⁷ by National Human Rights Commission (2004), Report U/S 21 (4) of The Scheduled Castes And The Scheduled Tribes (Prevention Of Atrocities) Act, 1989⁸⁸, by the Ministry Of Social Justice and Empowerment, Department of Social Justice and Empowerment (2017), the Status of Implementation & Need for Amendments in PoA Act in the context of 20 years of SC & ST (PoA) Act, 1989 by National Coalition for Strengthening SC & ST(PoA) Act, 1989, SCs & STs (PoA) Act Report Card by National Coalition for Strengthening SC & ST (PoA) Act, 1989 (2010), NCSC Report on (Police) Atrocities against Kuruvan community in Tamil Nadu by National Commission for Scheduled Castes (2016), Study Report on Crimes & Atrocities against SCs & STs with special reference to implementation of the Protection of Civil Rights (PCR) Act, 1955 and the PoA Act, 1989 in the states of Andhra Pradesh, Himachal Pradesh, Gujarat, Maharashtra, West Bengal, Orissa by Planning Commission (2012), to name only a few.

In addition to these, the Human Rights Watch (HRW) and the Center for Human Rights and Global Justice (CHRGJ) at New York University School of Law information to the Committee on the Elimination of Racial Discrimination for consideration in its review of India's fifteenth, sixteenth, seventeenth, eighteenth and nineteenth periodic reports under the International Convention on the Elimination of All Forms of Racial Discrimination, which has also been relied upon.

All these Reports indicate the challenges of the SC/ST victims in the criminal justice administration system and call for effective enforcement by the police and the judiciary while also discussing relief measures and social support for the marginalised groups and urging the government to address these gross violations of human rights of the SC/ST communities. In addition to these, most of these reports highlight the gross failure and inefficiency of the law enforcement agencies like police in ensuring that the SC/ST groups are able to enjoy their constitutionally guaranteed rights of equality and non-discrimination.

Similarly, land reform laws as well as debt relief legislation were also enacted as a strategy to offer better legal protection to marginalised groups like SC/ST through redistribution of land and regulating credit transactions.

⁸⁶ See https://www.indiaspend.com/wp-content/uploads/2020/09/NCDHR_REPORT-NEW2.pdf

⁸⁷ https://nhrc.nic.in/publication-non-priced?field_publications_type_tid=3142

⁸⁸ <https://socialjustice.nic.in/writereaddata/UploadFile/arpoa11.pdf>

2.1 Regulatory Framework

Offenses under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989

This violence or bodily harm against Dalits takes many forms. The offenses made punishable by the Prevention of Atrocities Act provide a glimpse into the types of retaliatory or customarily degrading treatment Dalits receive. The offenses include:

- G Forcing members of a scheduled caste or scheduled tribe to drink or eat any inedible or obnoxious substance;
- G Dumping excreta, waste matter, carcasses or any other obnoxious substance in their premises or neighborhood;
- G Forcibly removing their clothes and parading them naked or with painted face or body;
- G Interfering with their rights to land;
- G Compelling a member of a scheduled caste or scheduled tribe into forms of forced or bonded labor;
- G Corrupting or fouling the water of any spring, reservoir or any other source ordinarily used by scheduled castes or scheduled tribes;
- G Denying right of passage to a place of public resort;
- G Using a position of dominance to exploit a scheduled caste or scheduled tribe woman sexually.

Despite these offenses being criminalized under the Prevention of Atrocities Act, the systematic non-implementation of these provisions by the police results in a continued pattern of violence, as is borne out in several reports.

2.2 Constitutional and Legal Framework

The Constitutional framework offers a three-pronged approach to anti-discrimination for marginalised groups like Scheduled Castes and Scheduled Tribes. These include a protective mechanism that seeks to remove disabilities and enforce equality; compensatory discrimination mechanism like reservation in public services, representative bodies, educational institutions; and developmental mechanism like measures to bridge the wide gap between the Scheduled Castes and other communities in their economic conditions and social status, covering the allocation of resources and distribution of benefits

The Constitution inscribed social safeguards in Articles 17, 23, 24 and 25(2)(b). As per Article 17, untouchability is abolished and its practice in any form is forbidden, i.e.,

the enforcement of any disability arising out of “untouchability has been made an offence punishable in accordance with the law.” In 1955, Parliament enacted the “Untouchability” Offences Act to criminalize the practice of “Untouchability” and any form of social disability arising from it. This Act was amended and renamed The Protection of Civil Rights Act (PCR Act) in 1976. Subsequently, however, the provisions of the PCR Act and Indian Penal Code (IPC) were found to be inadequate in deterring crimes against members of the Scheduled Castes (SCs) and Scheduled Tribes (STs). As a result, the Indian Parliament enacted the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act in 1989.

The PoA Act introduced a new category of offences, i.e., “atrocities” committed against an SC or ST by a person/s not belonging to the SC or ST community and instituted special procedures for prosecuting these offences. Along with it, the law also mandated the designation of special courts for trying cases of atrocities and imposed more stringent punishment for those found guilty of caste-based atrocities. Rules to the PoA Act were framed in 1995.

In addition to these, other laws have been enacted from time to time to protect Scheduled Castes and Scheduled Tribes from degrading and humiliating practices imposed on them. The Employment of Manual scavengers and Construction of Dry Latrines (Prohibition) Act, 1993 is one such example. In addition to these, several labour laws were enacted or amended to safeguard working conditions and to prevent exploitative labour like Bonded Labour System (Abolition) Act, 1976, Minimum Wages Act, 1948, Equal Remuneration Act, 1976, Child Labour (Prohibition and Regulation) Act, 1986, Inter-State Migrant Workmen (Regulation of Employment and Conditions of Services) Act, 1979. While these laws were not confined to members of the SC/ST community, they impacted them nonetheless in major ways, owing to their poor economic conditions and low social status.

However, despite a robust statutory framework, atrocities continue to take place against SC/STs. According to the latest NCRB data, cases of atrocities against Dalits and Adivasis recorded under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (PoA Act) have increased by 281.75% and 575.33%, respectively between 2009 and 2018.

The manner of implementation of the PoA Act has also been a major concern among Adivasis and Dalit communities. According to a status report on the implementation of PoA Act, released by the National Dalit Movement for Justice (NDMJ), over the decade prior to 2018, the average conviction rate under PoA Act for cases of atrocities against Dalits and Adivasis remained at 25.2% and 22.8% respectively.

Crime/Atrocities against Scheduled Castes (SCS) - 2017-2019							
S. No.	State/UT	2017	2018	2019	Percentage State Share to All-India (2019)	Population of SCs (In Lakhs)	Rate of Total Crime against SCs (2019)
1	2	3	4	5	6	7	8
STATES:							
1	Andhra Pradesh	1969	1836	2071	4.5	84.5	24.5
2	Arunachal Pradesh	2	0	0	0.0	0.0	-
3	Assam	10	8	21	0.0	22.3	0.9
4	Bihar	6747	7061	6544	14.2	165.7	39.5
5	Chhattisgarh	283	264	341	0.7	32.7	10.4
6	Goa	10	5	3	0.0	0.3	11.8
7	Gujarat	1477	1426	1416	3.1	40.7	34.8
8	Haryana	762	961	1086	2.4	51.1	21.2
9	Himachal Pradesh.	109	130	189	0.4	17.3	10.9
10	Jammu & Kashmir	0	1	2	0.0	9.2	0.2
11	Jharkhand	541	537	651	1.4	39.9	16.3
12	Karnataka	1878	1325	1504	3.3	104.7	14.4
13	Kerala	916	887	858	1.9	30.4	28.2
14	Madhya Pradesh	5892	4753	5300	11.5	113.4	46.7
15	Maharashtra	1689	1974	2150	4.7	132.8	16.2
16	Manipur	0	0	0	0.0	1.0	0.0
17	Meghalaya	0	0	0	0.0	0.2	0.0
18	Mizoram	0	0	0	0.0	0.0	0.0
19	Nagaland	0	0	0	0.0	0.0	-
20	Odisha	1969	1778	1886	4.1	71.9	26.2
21	Punjab	118	168	166	0.4	88.6	1.9
22	Rajasthan	4238	4607	6794	14.8	122.2	55.6
23	Sikkim	5	5	4	0.0	0.3	14.1
24	Tamil Nadu	1362	1413	1144	2.5	144.4	7.9
25	Telangana	1466	1507	1690	3.7	54.3	31.1
26	Tripura	1	1	0	0.0	6.5	0.0
27	Uttar Pradesh	11444	11924	11829	25.8	413.6	28.6
28	Uttarakhand	96	58	84	0.2	18.9	4.4
29	West Bengal	138	119	119	0.3	214.6	0.6
TOTAL STATE(S)		43122	42748	45852	99.8	1981.6	23.1
UNION TERRITORIES:							
30	A & N Islands	0	0	0	0.0	0.0	-
31	Chandigarh	1	1	1	0.0	2.0	0.5
32	D&N Haveli	0	1	1	0.0	0.1	16.2
33	Daman & Diu	0	0	1	0.0	0.1	16.3
34	Delhi UT	48	36	76	0.2	28.1	2.7
35	Lakshadweep	0	0	0	0.0	0.0	-
36	Puducherry	32	7	4	0.0	2.0	2.0
TOTAL UT(S)		81	45	83	0.2	32.2	2.6
TOTAL (ALL INDIA)		43203	42793	45935	100.0	2013.8	22.8

• Actual Population of SCs as per the Population Census 2011 (RGI).
• Atrocities refers to Crimes committed against SCs by Non-SCs/STs. Cases under only IPC (without SC/ST Act) have been excluded as those cases refers to Crime against SCs by SCs/STs.
• As per data provided by States/UTs
• Due to non-receipt of data from West Bengal in time for 2019, Data furnished for 2018 has been used

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2.3. Institutional Framework

(a) Police

The Status of Policing in India Report 2019 prepared by Common Cause and the Centre for the Study of Developing Societies drawing from official government data disclosed that state police forces recruit primarily from upper caste communities. While the Constitution mandates reservation for SCs, STs and OBCs in public service recruitment, including police, the data disclosed that both at the national and state level they continue to be underrepresented. State governments traditionally do not care for a more representative police force, make “patchy” police recruitments before the election and do not “go out of their way to recruit Dalits or Tribals”, the Report indicated.

The 2019 Report also revealed that the number of women in police force is exceptionally low with the average percentage of women in 23 states remaining at 7.3 percent. In spite of advisories sent to state governments in 2013 and 2014, about increasing representation of women to 33 percent, the numbers have not changed much.

These numbers are telling especially in the face of increasing caste-based atrocities.

Therefore, the composition of a predominantly upper-caste male police force becomes significant to understand the patterns of impunity inscribed not only in the institutional design of criminal justice apparatus, with its centrality to policing, from registration of FIRs to investigation and trial but also the making of a carceral state with a disproportionate burden on Dalits and Muslims. Dereliction of duty of police in atrocity cases is therefore not incidental or accidental, but deliberate and purposeful and part of an institutional design to keep Dalits in check.

In the UK, the Macpherson Committee Report in 1999 delivered a damning indictment of the Metropolitan Police, holding it accountable for ‘institutional racism’ after a sloppy and incompetent investigation of the murder of a black teenager Stephen Lawrence made it necessary to examine the nature of policing there. 67 out of 70 recommendations of the Committee were executed fully or in part. In India, the Janata Party instituted National Police Commission in 1977 after the Emergency which produced eight reports between 1978 and 1981 suggesting a near overhaul of the police system as it existed. These included several recommendations to curb institutional bias of police including a judicial inquiry into complaints against the police under certain circumstances, reducing police immunity from prosecution, creating police complaint boards, fixing tenures for police chiefs and issuing guidelines for reducing police harassment of the public, among other things. None of the recommendations have been implemented.

In 2006, the Supreme Court in Prakash Singh issued several directions on police reforms drawing from the NPC recommendations and urged the Central and the state governments to enact new police laws to minimize if not eradicate political interference. Several states have deliberately enacted laws that legitimize the status quo and circumvent the implementation of the Prakash Singh judgement. Others have passed executive orders diluting and amending the direction in the case and none have implemented the order in its spirit.

A 2009 Report by Human Rights Watch noted that the Indian police has become a 'law unto themselves' and commented on the 'dangerous state of disrepair of the Indian police', 'political interference and stalled reforms' and 'failure to register complaints and investigate crime'.

(b) Special Courts

In accordance with Section 14 of the PoA Act, for the purpose of providing for a speedy trial, the State Government shall, with the concurrence of the Chief Justice of the High Court, establish an Exclusive Special Court for one or more districts. Further in the districts where less number of cases under the Act is recorded, with the concurrence of the Chief Justice of the High Court specify for such Districts, the Court of Session to be a Special Court to try the offences under the Act. These Courts have powers to take direct cognizance of offences under the Act, and it is the duty of the State Government to establish adequate number of Courts to ensure that cases under the Act are disposed of within two months, as far as possible.

Rights of Victims and Witnesses (flouted)

i. Compensation: The Commission has observed that the States delay payment of compensation to the victim(s) of caste atrocity. In many cases compensation is paid only when the Commission intervenes or when the matter is followed up by the family of the victim rigorously. Annual Report, National Commission for Scheduled Castes, 2016-2017

Right to Legal Aid: Article 39A of the Constitution provides for free legal aid to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. The Legal Services Authorities Act, 1987 was enacted to constitute special authorities for providing free and competent legal services to weaker sections of the society. Section 4 (m) of the LSA Act provides for special efforts to be made for enlisting the support of voluntary social welfare institutions, particularly among Scheduled Castes

and Scheduled Tribes. Section 12 of the LSA Act provides for free legal aid to the Scheduled Castes and Scheduled Tribes. Similarly, Section 21 (2) (i) cast a duty on the State for making the provision for adequate facilities, including legal aid to the persons subjected to atrocities to enable them to avail themselves of justice. However, very few atrocity victims received legal aid as studies indicate.

ii. Victim's Right to Appeal under the PoA Act: The victim has a right to an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such court. The said provisions seem to have been flouted. Most of the states are lagging in supporting victims to file an appeal against the acquittal orders. Table provided at the end as Annexure.

Reasons for high rate of acquittal in cases registered under POA:

- Hostile witnesses: Hostile witness is the major reason for high rate of acquittals in the atrocity cases. The economic dependency on the upper and dominant castes, and the state of insecurity, has forced the prosecution witnesses in many a case to turn hostile.
- The preconception of misuse of the Act: Most of the administrative machinery officials, court officers and police officers believe that the SCs and STs are misusing the special law against their rivals and adversaries. As a result of this impression, most of the Judges are skeptical and wary of awarding convictions. The study also found that under the SCs and STs (POA) Act, 1989, some of the offences (especially taking the caste name of the untouchable) are not major crimes, and such offences should not attract severe punishment from the court of law. We have come across a few cases where a judge has concluded that a victim is trying to misuse the Act, if he tried to settle the case outside the court and if the accused complained that the victim is trying to extract money from him.
- Police inaction: Cases are not registering as per the number of atrocities done. When the complainant reached the police station, police officers try to compromise the case. Police officials do not want to redress the issue, visit the scene of crime, register immediately and empower the weaker sections. In most situations, cases are not registered in the time limit i.e. 30 days and due to this most of the victims lose time, courage and do not pursue the case.

- Lack of designated Courts: There shall be an exclusive special designated court in every district to look after atrocity cases. Session court works as Special Court in all these districts and this type of court also works for other cases and due to this primary importance is not being given by the court. In some of the murder cases, the accused gets bail by applying to High Court, which should be taken into consideration that as per the law the accused should not get any bail.

From Planning Commission Report (2012) titled Study Report on- Crimes & Atrocities against SCs & STs with special reference to implementation of the Protection of Civil Rights (PCR) Act, 1955 and the PoA Act, 1989 in the states of Andhra Pradesh, Himachal Pradesh, Gujarat, Maharashtra, West Bengal, Orissa.

Response from Police as Law Enforcement Authority

The Human Rights Watch (HRW) and the Center for Human Rights and Global Justice (CHRGJ) at New York University School of Law submitted information to the Committee on the Elimination of Racial Discrimination, which revealed that-

- Dalits are disproportionately targeted by the police for a number of reasons. According to the NHRC, under a theory of collective punishment, the police will often subject entire Dalit communities to violent search and seizure operations in search of one individual. State agencies too have colluded with private actors from dominant castes in committing human rights violations against Dalits.
- Dalits are particularly vulnerable to arrest under draconian security laws. For example, in at least two states, Jharkhand and Andhra Pradesh, the Prevention of Terrorism Act (2002) (POTA), was widely used against Dalits, who were targeted for their caste status rather than any involvement in criminal or terrorist activity.
- Police systematically fail to properly register crimes under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, and the Protection of Civil Rights Act, 1955. Improper and under-registration of Dalit cases is both a result of police officers' reluctance to entertain complaints by Dalits, as well as their lack of familiarity with provisions of the relevant legislation. The National Commission for Scheduled Castes and Scheduled Tribes has concluded that "a large number of cases of atrocities go unregistered, mainly because of reluctance on the part of police officers to register the cases." The NHRC has confirmed that the lack of registered cases does not represent an actual reduction in the practice of "untouchability"

- In addition to non-registration of cases, police routinely engage in improper registration of cases. Dalit cases are often generally registered under the Indian Penal Code, instead of the Protection of Civil Rights Act, 1955 and the Prevention of Atrocities Act, 1989. Moreover, in a distorted interpretation of the Prevention of Atrocities Act, police officials require explicit mention of abuse by caste name for all atrocities.
- Improper and under-registration of Dalit cases adversely affects case outcomes. Cases are less likely to be prosecuted and even when pursued, are more likely to result in acquittal when the police have failed to collect evidence. Perpetrators, if convicted, are punished with a lesser sentence, and/or are likely to be released on bail. Further, the appropriate relief may not be available when the proper sections of the law are not cited. More broadly, these problems have caused a loss of faith in law enforcement, which further diminishes the number of cases registered.
- One of the principal ways in which the right of Dalits to equal treatment before organs administering justice is being denied is through the poor quality of prosecutions under the Protection of Civil Rights Act and Prevention of Atrocities Act. The government of India has itself noted this failure in its 2001-2002 Annual Report on the Prevention of Atrocities Act, which states that in 2002, only 2.31 percent of cases brought under the Prevention of Atrocities Acts had resulted in convictions. The low rate of convictions, compared to the high number of atrocities reported against Dalits, speaks to the caste bias of prosecutors, as well as other organs of justice, including the judiciary.

2.4 Recommendations

In terms of the Sakshi, Dalit Human Rights Monitor Report, Recommendations made by the Commission for SCs/STs, Human Rights Watch Report and several other Reports, the following may be offered as recommendations:

- a. Sensitize all police departments on the SC/ST (Prevention of Atrocities) Act, Human Rights Act, and the international standards of human rights set by CERD, UDHR, ICCPR, and ICESCR. In particular, educate police personnel on the origins of these Acts (SC/ST Act and HRA), being sure to address such issues as the necessity of the acts, their purpose, mechanisms and how they are intended to address the rights of Dalits. Training programmes may be conducted by every State Government for police

- personnel to sensitize them regarding implementation of the provisions of SCs & STs (Prevention of Atrocities) Act, 1989 and the Protection of Civil Rights Act, 1955 either through its Police Training Institutions or otherwise.
- b. Recruit Dalits into all levels of the police force, but especially at the decision-making levels.
 - c. Ensure that States constitute and oversee State and District level Vigilance and Monitoring Committees, as required by Rules 16 and 17 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Rules, 1995, to properly implement the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 [hereinafter the Atrocities Rules and the Atrocities Act]. This effort should ensure that a sufficient number of investigators (including appropriate representation of Dalit men and women) are included in the committees to guarantee full implementation of the act. Given the number of potential cases, the government should enlist lawyers, social workers, medical personnel, teachers, civil servants, and others involved in Dalit issues as investigators. Non-governmental organization (NGO) representatives should also be consulted in the recruitment of investigators. Committees should submit their reports to district collectors to pursue prosecution. In turn, collectors should report on actions taken during committee meetings. Reports published by the committee should be made public, and in-depth training should be provided to district officials charged with enforcing the act.
 - d. All complaints given by Dalits should be registered as an FIR, by forbidding discretionary powers to the officer responsible for registering complaints.
 - e. All offences against Dalits by non-Dalits should be registered under the SC/ST (Prevention of Atrocities) Act.
 - f. Prompt disciplinary and legal action under Section 4 SC/ST (Prevention of Atrocities) Act should be taken against police who refuse to register cases under the Act as they are directed to do under Rule 5(1).
 - g. All cases registered under the Protection of Civil Rights Act to be r/w. SC/ST (Prevention of Atrocities) Act.
 - h. In cases under the SC/ST (Prevention of Atrocities) Act, ensure the investigating officer is no less than DSP, under Rule 7(1).

- i. Take legal and departmental disciplinary action against police officials who willfully neglect to discharge their duties required under the SC/ST Act (sec.4 SC/ST Act).
- j. Ensure charge sheets are filed within three months for FIRs filed under the SC/ST (Prevention of Atrocities) Act. If not, take disciplinary action against investigating officer.
- k. Ensure strict implementation of the Atrocities Act, as regards victims of violent abuse and other "atrocities". Each police station should have a Scheduled Caste/ Scheduled Tribe atrocities cell to handle investigations of abuses and alleged violations of the Atrocities Act. Each revenue district should also have a special deputy superintendent of police charged with investigating atrocities under the Act. In keeping with the Atrocities Rules, police who refuse to register cases under the Act should be punished accordingly. For full implementation of the Act, these cells should be statutorily empowered to receive and address complaints of violations under the Act and complaints of official misconduct. They should also be able to file "first information reports" (FIRs), the first step in prosecution of a criminal charge when abuses are committed against Dalits. The cells should work closely with the Vigilance and Monitoring Committees established under the Atrocities Rules to ensure full enforcement.
- l. Provide training to district officials charged with enforcing the Atrocities Act and ensure that a copy of the Act (translated into the local language) and accompanying rules are easily available and prominently posted in all local-level police stations and available in all courts trying cases under the Act.
- m. Establish a civilian review board or civilian ombudsman committee comprising judges and lawyers to monitor police stations and ensure that Supreme Court guidelines on the treatment of persons in custody, as established in D.K. Basu v. State of West Bengal, is strictly enforced. NGO input should also be solicited. Ensure that complaints against law enforcement personnel are promptly and thoroughly investigated by adequately trained investigatory staff. The agency should have the power to subpoena documents, summon witnesses, and enter the premises of police stations, lock-ups, and detention centers to conduct thorough investigations.
- n. Implement the recommendations made by the National Police Commission in 1980, especially those that call for a mandatory judicial inquiry in cases of alleged rape, death, or grievous injury of people in police custody and the establishment of investigative bodies whose members should include civilians as well as police and judicial authorities.

- o. Ensure that each police station has adequate female police personnel, consistent with recommendations made by the National Commission for Scheduled Castes and Scheduled Tribes. Female police should record complaints submitted by women. Each police station should also have adequate scheduled caste and scheduled tribe personnel and enough financial resources to carry out investigations.
- p. Constitute citizen's police monitoring committees with majority Dalit representation.
- q. Ensure the District Superintendent promptly visits the place of occurrence of atrocity and fulfills his responsibilities under Rule 12(1), (2) & (3), particularly:
 - Ensuring FIR is registered under the Act and effective measures for apprehending the accused are taken.
 - Deploy police force in the area and take other preventive measures against further occurrence of atrocities.
- r. For each district, these special SPs and Deputy SPs should also be empowered to receive and address complaints of violations and complaints of official misconduct under the Act.
- s. Display the Act on billboards or wall posters in all the police stations, especially in the rural areas.
- t. Text messaging services, social media, television, etc. may be used for sharing information about the SC/ST Act including helpline numbers.

3. JUDICIAL INTERVENTION AND CASE STUDY

The two main concerns that arise in relation to the legal rights of the marginalized section of the society are- protection from atrocities and adequate representation. The judiciary has invariably played an important role in addressing these caste issues. What needs to be analysed is whether these decisions have at all played a positive role or built a direct impact in the upliftment of the marginalized castes, which is the end sought to be achieved in all actions related to such underprivileged section.

3.1 Interpretation by the Judiciary

The nature of judicial intervention in India's marginalized communities can be assessed through the Court's substantive interpretation of the **interventionist role** the law plays in **remedying structural evils** of the existing social order. For such purpose, two prominent case laws are relevant:

(i) State of Kerala v. N. M. Thomas AIR 1976 SC 490

N.M. Thomas & the Constitutional Conceptualisation of Equality: This case involved a challenge to the Kerala State and Subordinate Service Rules, as existing at the time, which provided temporary preferences to Scheduled Castes and Scheduled Tribes for promotions in the employment of state services by guaranteeing a certain number of slots for members of said castes and tribes. Such provision was assailed to be in violation of the prohibition against discrimination as envisaged in Articles 15 read with the right to equality under Article 14.

In settling the above question, the Supreme Court theorized the doctrine of protective classification within the contours of Article 14 as an extension of the constitutional vision of "compensatory discrimination."⁸⁹ The Court held:

"Equality is amongst equals. Classification is, therefore, to be founded on substantial differences which distinguish persons grouped together from those left out of the groups and such differential attributes must bear a just and rational relation to the object sought to be achieved."

The Court ruled that Article 14's guarantee of equality did not merely entail equality among all individuals, but rather is equally applicable among similarly situated groups

(i) Indra Sawhney v. Union of India (1993) 1 SCJ 353

Indra Sawhney & the Causational Link between Poverty & Historical Discrimination: The Court in Indra Sawhney evaluated the underlying principles concerning reservation policy for SCs & STs.

The Court held that for availing benefits of a reservation policy, caste membership, while relevant, should not be the dominant criterion. Unsatisfied with the basis that neither poverty or caste by itself constituted the basis for determining the extent of such a reservation policy, Justice Thommen developed a **nexus test** for establishing a **causational/incidental connection between poverty and historical discrimination** as a means to legitimize the designation of a Scheduled Caste or Scheduled Tribe. He held:

"[T]he question to be asked, for the purposes of reservation is whether such poverty is the result of identified historical or continuing discrimination. No matter what caused the discrimination and exploitation; the question is, did such inequity and injustice result in poverty and backwardness[.]"

⁸⁹ S. Laxman Rao, Positive Discrimination as a Constitutional Right: Emerging Patterns and New Challenges, INDIAN J. HUM. RTS. 110 (2001).

The Court held that constitutional protections under Article 14 envisage the **relationship between a group's present standing in society and its history of prior discrimination** and that such a relationship ought to be evaluated through an **examination of the social meaning of the designation of such group over a period of time.**

3.2 Ascertaining “Backward Classes”:

Assessing the theoretical and practical basis for determining what the usage of the term “backward” entails in a qualitative sense is a key component of this module. For such purpose, reliance must be placed on both judicial rulings and non-judicial literature.

- a. **Economic Criteria/Occupation-cum-Income Factor:** In *R. Chitralakha and v. State of Mysore*,⁹⁰ AIR 1964 SC 1823 the Supreme Court held that identification of backward classes based on economic considerations, which would in the ordinary course eliminate the “creamy layer” problem, was valid and is not violative of Article 15(4) of the Constitution. In *K.C. Vasanth Kumar v. State of Karnataka* AIR 1985 SC 1495, the Supreme Court further deemed economic indicators as one of the true measures for determining backwardness. The Court believed that applying the economic criteria would serve the dual purpose of both gradually eliminating poverty as well as rooting out the caste menace.

The rulings in *Chitralakha & Vasanth Kumar* had a cascading effect in **decentralising the identification of OBCs** which has led to **confusion** in identifying said classes owing to the **absence of any constitutional definition** of such term and the **lack of development of any uniform criteria** in the scheduling of said communities by Union and State governments.⁹¹

The occupation-cum-income factor upheld in *Chitralakha & Vasanth Kumar* is important for two reasons: (i) the economic test is particularly **effective in eliminating the “creamy layer” problem** by preventing privileged sections of marginalised communities from usurping benefits meant for the weaker sections of said communities; and (ii) there is a **direct causational relationship** between economic backwardness and social backwardness as the former usually results in the latter.

⁹⁰ The present case was filed by students who failed to gain admission to professional colleges. They filed petitions among other issues, urged the quashing of the order of the Government regarding reserved seats for the backward classes. The order stated that a family with an income of Rs. 1,200 per annum or less and those persons or classes engaged in the occupations of agriculture, petty business, inferior services and other occupations involving manual labour were, generally, socially economically and educationally backward. The impugned Order did not take caste into consideration. The Supreme Court expressed reservations and said that the classification was not perfect.

⁹¹ S. M. Dahiwale, Identifying ‘Backwardness’ in Maharashtra, 35 ECON. & POL. WKLY. 3293 (2000).

However, Vasanth Kumar’s reliance on the **‘means’ test** which it held can be determined by respective State Governments, presents a uniformity challenge. For reference, the ‘means’ test, as established in *Indra Sawhney*, refers to the **imposition of an income limit**, for excluding persons (from the backward classes) whose income is above the said limit and is synonymous with the ‘creamy layer’ hypothesis. If left to State Governments, the determination of such ‘means’ may result in **ambiguity and entrench further disparity.**

In light of the above findings, it may be recommended that a methodology be identified and developed which will be **uniformly applicable across the entire country by delineating a particular income level** as being eligible for reservation.

- b. **Educational Backwardness:** While educational backwardness is not considered a **parameter by itself** for determining backwardness, it has nonetheless been recognised by the Supreme Court in *Vasanth Kumar* as to be **among other indicators** which are to be **taken together** when determining the backwardness of a social group.
- c. **Territorial or Geographical Criteria:** In *State of Uttar Pradesh v. Pradip Tandon*,⁹² AIR 1975 SC 563, the Supreme Court ruled that while reservations for social groups who suffer from **disability owing to their place of residence** would be constitutionally valid in theory, such reservation **cannot exceed the 50% rule** established in *Balaji v. State of Mysore* AIR 1963 SC 649
- d. **Caste & Class Dichotomy:** In its ruling in *Balaji v. State of Mysore* AIR 1963 SC 649 the Supreme Court **rejected** the notion of **caste as the sole consideration** for determining backwardness on the ground that in addition to such consideration being violative of Article 15(4) of the Constitution, the benefits of reservation would be denied to backward classes in communities where caste was **not a factor** to the extent of determining the backwardness of such classes was concerned.

The aforementioned rulings must be read in consonance with the **standards for determination of Backward Classes** as set forth by the **Mandal Commission.**

⁹² Candidates from mountainous and rural areas of Uttarakhand were granted reservations for admission in medical colleges in Uttar Pradesh. The State contended that these areas lacked educational facilities and that the economic condition of the people residing there was unsatisfactory. It was further noted the income level was low and that poverty was rampant. Coupled with backward modes of communication and transportation, it was apparent that these areas were always neglected. Due to such reasons, it was considered that people residing in said areas were socially backward.

As per such standards, for the satisfaction of the designation of “backwardness” of any particular social group, the said social groups must satisfy the following socio-economic thresholds:

Social:

- G primarily depend on manual labour for their livelihood;
- G at least 25% of females and 10% of males above the state average get married at an age below 17 years in rural areas;
- G participation of females in work is at least 25 % above the state average;

Educational:

- G number of children in the age group of 5–15 years who never attended school is at least 25% above the state average;
- G rate of student drop-out in the age group of 5–15 years is at least 25% above the state average;
- G proportion of matriculates is at least 25% below the state average.

Economic:

- G average value of family assets is at least 25% below the state average;
- G number of families living in kuccha houses is at least 25% above the state average;
- G source of drinking water is beyond a half kilometer for more than 50% of the households;
- G number of households having taken consumption loans is at least 25% above the state average.

3.3 Analysis of the Judgments on different Parameters

- In *State of Madras v. Dorairajan* (1951) SCR 525 the Court found a governmental policy reserving admission into engineering and medical colleges for certain castes to be a violation of the constitutional prohibition in Article 29(2) against caste discrimination in admission to state-aided schools. In response, Parliament nullified the ruling by adding Art. 15(4) to the Constitution, allowing reservations “for the advancement of any socially and educationally backward classes of citizens”. This expanded the scope of reservations to include Other Backwards Classes (“OBCs”), namely, disadvantaged groups other than the SCs and STs whose rights were recognized at the enactment of the Constitution.

In India, the rationale was to advance backward classes and in Israel, the Court attempted to establish the non-Orthodox versions of Judaism as viable alternatives within the public sphere, where the Indian counterpart has shown greater intervention in religious matters that are intrinsically intertwined with caste discrimination, especially when this constructive is compared with the factual circumstances of the present case that had community and caste interests to create a ‘political rigmarole’ right after India’s independence. The difference in the approach that has been taken by India and Israel, in this particular aspect, even with the role of Judicial Activism, Civil Society and Personal Laws in what is a very unique of Caste issues in India vis-à-vis the question of religious communities and personal adjudication in case of Israel would be an interesting area of comparison to learn from. It addresses a similar experience, if not from the ‘same’ experience. This directly ties to one of the major problems that persist in the connotation of OBCs, existing when SCs and STs are also present in the same spectrum, without any clear constitutional categorization, is that although some minority communities qualify for reservations as OBCs on grounds of their social and educational backwardness, owing to their historical discrimination, as the three parameters, this is a “back-door” route as has been pointed out; they are not entitled to the benefit of reservations qua minorities i.e. the important question of religious caste minorities i.e. Muslim⁹³ and Christian Dalits are widely recognized to be more socio-economically and educationally disadvantaged than their non-Dalit co-religionists while suffering discrimination on grounds of caste at the hands of both the wider community and their co-religionists.’ The scope of OBCs has been theoretically narrowly construed but practically a bit wider than academic anticipation.

As far as affirmative action is concerned, the Central Educational Institutions (Reservation in Admission) Act of 2006 (No. 5 of 2007) was passed pursuant to Article 15(5) to reserve seats, inter alia, for other backward classes (OBCs) in central educational institutions. OBCs, as defined under the Act, means “the class or classes of citizens who are socially and educationally backward, and are so determined by the Central Government.” However, the central government has hitherto neither determined the class or classes of citizens who are entitled to get reservation of seats in central educational institutions nor has laid down any standard or criterion for determining the status of OBCs for admission purposes. This is certainly a very serious lacuna. This predicament can be compared with the Apex Court’s view⁹⁴ where his Lordships

⁹³ Sanjiv Gajanan Punalekar v Union of India 2011 SCC OnLine Bom 634

⁹⁴ Ashok Kumar Thakur v Union of India (2008) 6 SCC 1

recorded that “before carrying out Constitutional Amendments the Union of India must target its beneficiaries.” It is erroneous to make the law first and “thereafter target the law’s beneficiaries.” However, this is not a lone instance. Words of a statute, the court emphasized, “must be construed with some imagination of the purposes which lie behind them.” This aligns with the principle that the Judiciary can legislate only on ‘interstitially in attempt to iron out the creases’. This is, however, not a standalone example and merely indicative of how identification and reservation have targeted failed.

- In **MCD v Veena** 2001 SCC OnLine SC 949 the matter pertained to a particular scenario where, by virtue of a GOI notification dated 15.11.1993 there was a certain Annexure ‘AA’ which indicated that OBCs would be recognized as such in the NGT. It is also to be noted that there were periodic instructions issued from time to time by the Government of India ‘which indicated that a person belonging to the OBC community on migration from the State of his origin to another State where his caste was not in the OBC list was entitled to the benefits or concessions admissible to OBCs in his State of origin and the Union Government, but not in the State to which he has migrated’. The judgment held that Castes or groups are specified in relation to a given State or Union Territory, which means that such caste would include caste belonging to an OBC group in relation to that particular State or Union Territory for which it has been specified. The parameters that are to be taken into consideration for specifying a particular caste in a particular group belonging to OBCs would depend on the nature and extent of the disadvantages and hardships that have been suffered by that Caste or group in the State; which not might be so in the other State. However, it may not be so in another State to which a person belonging thereto goes by migration. It may also be that a Caste belonging to the same nomenclature that is specified in two States but the considerations on the basis of which they had specified so in the same category might be different. Thus it has to be noted that ‘merely because a given Caste is specified in one State as belonging to the OBCs, does not necessarily mean that if there is another group belonging to the same nomenclature in another State i.e. for instance the OBCs in the present case, then a person belonging to that group would be entitled to the same rights, privileges and benefits admissible to the members of that Caste.’ This has to be taken into consideration because (a) the Central and State government schemes and their applicability have to be taken into question; (b) the conditional differences in the way people are treated.

- In **M. Nagaraj v. Union of India (2006) 8 SCC 212** the construction of Article 16(4A) statutorily in an unambiguous fashion provides for reservation in promotion for Scheduled Castes and Scheduled Tribes in services under the State as a matter of policy. However, when the constitutionality of Article 16(4A) was challenged before the Supreme Court in this matter under the aegis of Article 16(4A) of the Constitution, the distinction between OBCs on one hand and the SCs and STs, on the other hand, became blurred and the identification of OBCs was a matter of question again. The total reservation that was enjoyed by SCs/STs and OBCs were lumped together, to a cumulative 49% that found it difficult to segregate in ‘actual and solid’ terms, Article 16(4A) has been inserted as a special provision to counter the ‘backlog vacancies’ if the Indra Sawhney judgment was to be complied with. It was held by the court that the sub-classification between SCs and STs vis-a-vis OBCs had also been declared to be within the confines of egalitarian equality in the same fashion that Indra Sawhney was decided on -‘constitutional permissibility of creamy layer of OBCs’. The question of egalitarian equality versus the Preamble and the Fundamental Rights differently is in question that has not been adequately answered by judicial intervention.
- In **Ram Singh and Ors v Union of India** 2015 SCC OnLine SC 222 in this judgment, it was held that the identification of ‘backwardness’ through the use of known parameters, such as social, economic and historical oppression and discrimination should not be solely based on these identifiers, such as the third gender. There is a duty on the State to be innovative and vigilant in terms of discovery, which has to be performed without political influence. Perception cannot be the permissible yardstick for determining backwardness and identification on the basis of caste alone is not encouraged because there is a need to continuously evolve in bases, practices and methods for determination of ‘true backwardness’. This has to be done so that deserving affirmative action through newly emerging groups is not left out. ‘Social Class is an identifiable section where ‘Backwardness’ may be social, cultural, economic, educational or political and the foundation of Articles 16(4) and 15(4) lay focus on affirmative action where the recognition of ‘third gender as a socially and educationally backward class of citizens’ (2014) 5 SCC 438 is a significant example.

In the question of the extent of representation of the disadvantaged on the litigation canvas, as either participants or beneficiaries, the Supreme Court docket had 86 fundamental rights cases concerning women’s or children’s rights, 180 fundamental rights cases involving Scheduled Castes and Scheduled Tribes (“SCSTs”) or Other Backward Classes (“OBCs”), while there were 2800 cases that the Court had itself

classified as PILs. In a neoliberal world where India is a developing country with large labour stock reserves, without enough labour support through Labour laws and Codes, access to Justice as a matter of question stands ambiguous in e-commerce contexts that are burgeoning in terms of presence as seen, especially when the three categories of unskilled, semi-skilled and skilled are considered.

- In **Chairman and MD, Food Corporation of India and Others v Jagdish Balam Bahira** 2017 SCC OnLine SC 715 which dealt with the Maharashtra Caste Certificate Act, 2001, there was a harmonious construction required between Sections 7 and 10 of the 2001 Act in order to resolve a dispute through restitution in case of gains made by a wrongdoer seeking to receive the benefits, much to the detriment of legitimate claimants. As far as Section 7 of the Act is concerned, it provides for the cancellation of a caste certificate where a person who does not belong to a reserved category has obtained a false certificate and the Scrutiny Committee, after enquiry, is of the opinion that the certificate was obtained fraudulently. These conditions form the basis of Section 7 of the 2001 Act, which would successfully lead to the cancellation of a Caste certificate. Section 7 is based on the contents of Section 8 where a person is aware of the caste, tribe or class that he is seeking protection by imposing the burden of proof. These two sections, when compared with Section 10 of the 2001 Act have to be construed in harmony where in case of the latter, the civil benefits would be withdrawn as benefits that were given when the false caste certificate was issued. Criminal prosecution would require mens rea but in so far as the requirement of a dishonest intention is concerned, for the application of Section 10, that is erroneous and does not reflect the correct legal position. This can be compared with the criteria that were laid down by the Mandal Commission which is the most extensive literature on the OBCs and the American case of University of Texas in Fisher vs. Texas that dealt with similar caste and race-conscious politics.
- In the instance of **National Legal Services Authority vs. Union of India** 2014 SCC OnLine SC 328, this judgment was particularly applauded for extending the constitutional benefits and ensuring that there were OBC Transgenders as well without any gender barrier. This was instrumental in enlarging the constitutional principles to the 'backward societal mindset that refuse to acknowledge their physical as well as legal rights inherently present, by virtue of their existence'.
- **R.Unnikrishnan and Anr v V.K. Mahanudevan** 2014 SCC OnLine SC 28 held that all the Thandan OBCs have been wrongly classified as Thandan SCs prior to the effective date of the 2007 Amendment (i.e. 30-8-2007), those who had obtained an appointment

on the basis of an SC caste certificate would be entitled to continue in service. The respondent who was a Thandan OBC, therefore, would be entitled to retain such benefits. However, from 30-8-2007, the respondent and similarly situated persons would not be entitled to any further benefit on basis of SC status but only to benefits admissible to them as OBC. But, any benefit already granted to the respondent, solely on the basis of being an SC after 30-8-2007, may, if so advised, be withdrawn by the competent authority, then such a relief on the ground of equity is available to such candidates by consideration of facts and circumstances of each case and would depend upon the bona fides of a person getting the appointment

The Wire, in a series of articles, has questioned the role of judiciary in acknowledging the marginalization against the Dalits, Tribals and other Scheduled Castes or Backward Castes. In fact, in one of its reports, it stated, ".....those entrusted with upholding the constitution have tended to treat Dalits and Adivasis with utter insensitivity." It noted that the courts in delivering judgments upholding the constitutional values have failed in understanding the social protection needed by Dalits and Tribals. The language in these judgments reflects the inherent stereotypes against the idea of reservations. In *Mukesh Kumar vs. The State of Uttarakhand*, a two-judge bench of J. L. Nageswara Rao and J. Hemant Gupta held that a government is not bound to provide reservations, even if there is inadequacy in representation in services.

The see-saw of responsibilities is also clearly vying as between the government and the judiciary. On one side, the Supreme Court has restricted the application of reservation through its consistent judgments by placing a mandatory condition for any government to collect data regarding the inadequate representation of Dalits and tribals and to exclude the "creamy layer", before making a reservation in promotion policies. But, on the other side, the court abdicated its responsibility by holding that it would not hold the government accountable even if the under-representation of Dalits and tribals in public services is brought to its notice.

3.4 Identifying Areas of Judicial Intervention

SCs, STs, OBCs & the undertrial epidemic—SCs, STs & OBCs disproportionately constitute the greater number of undertrial prisoners in India. In our view, this prevailing issue warrants action by the courts in respect of: (i) instituting more **effective mechanisms of speedy disposal of pending cases**, (ii) ensuring **consistent enforcement of judicial decisions** and (iii) maintaining **judicial oversight of operational legal aid services**. The

dimensions of such an issue are:

- G Between 2002-2019 (excluding 2016), NCRB's 2019 prison data report (published on August 2020) stated that nearly two in three undertrials (64%) on average were from the SCs (21.7%), scheduled tribes (STs or Adivasi communities, 12.3%), and other backward classes (OBCs, 30%).⁹⁵
- G Most experts attribute the problem partly to the unsatisfactory state of legal aid services in the country, citing lack of pay as a disincentivizing factor preventing paralegals/attorneys from striving to perform well.
- G The other part of the problem stems from a lack of awareness among undertrials about parole and bail rules also results in longer incarceration. As per NCRB's 2019 prison data, 28.6% of undertrials in India are illiterate and 40.7% were not educated beyond grade X.
- G Over-arresting and over-policing are responsible for such disproportionate representation of marginalised communities in the undertrial population. Police make "unnecessary arrests" which are in contravention to the spirit of the pronouncement of the Supreme Court in *Arnesh Kumar v. State of Bihar*, MANU/SC/0559/2014,⁹⁶ which speaks about "unnecessary incarceration" for members of marginalised communities rising out of of poor or no legal representation, and the failure of mechanisms such as the Undertrial Review Committees.
- G Once a member of a marginalised community is registered within the criminal justice system, they are targeted and profiled for offences repeatedly and are vulnerable to illegal detentions, false confessional statements and arbitrary arrests. Delays in investigations only operate to compound the severity of the situation.⁹⁷

4. ACTION PLAN

In matters of taking action for the marginalised, especially the backward castes, scheduled castes and scheduled tribes, the grey or overlapping area of the otherwise economically stable groups arises, leaving a question mark. Considering the diversity of India, it may be almost impossible to segregate each of such sections on a differential basis. Keeping this fact in view, the Action Plan, as also the module on castes has been prepared

⁹⁵ https://infogram.com/undertrial_prisoners_marginalised-1hxj48kr370q4vg

⁹⁶ Para 8 of the judgment reads: We believe that no arrest should be made only because the offence is non-bailable and cognizable and therefore, lawful for the police officers to do so. The existence of the power to arrest is one thing, the justification for the exercise of it is another."

⁹⁷ <https://www.indiaspend.com/indias-jail-stats-7-in-10-undertrials-1-in-3-dalit-adviasi/>

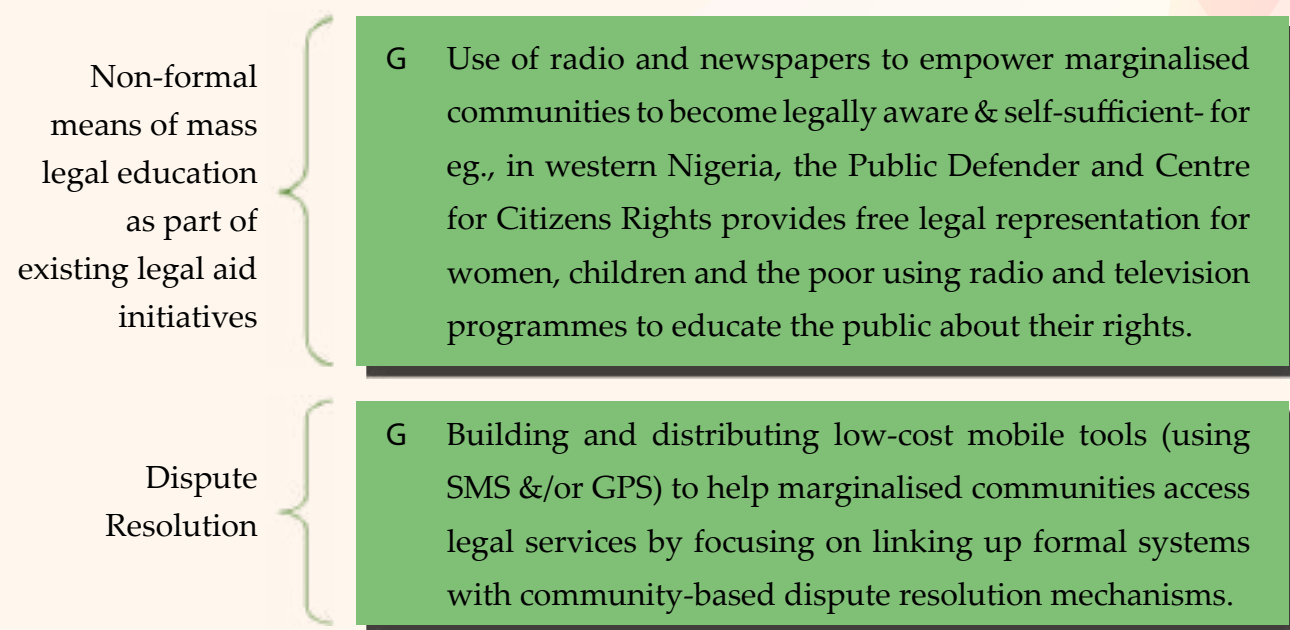
with an understanding that the recommendations will not be concerned with the creamy layer hypothesis, but rather limit itself to the identification of such caste/OBC groups which are socio-economically deprived and can thus be considered as legitimate beneficiaries. In fact, one of the recommendations of the Sachar Committee was also that the idea of providing certain incentives to a 'diversity index' should be explored. This is a complex proposition, but if a transparent and acceptable method to measure diversity can be developed, a wide variety of incentives can be linked to this index so as to ensure equal opportunity to all SRCs in the areas of education, government and private employment and housing.

This aspect of the proposed Action Plan attempts to preliminarily suggest capacity-building measures for the marginalised castes to access legal services through universally basic Information and Communication Technologies (ICTs).⁹⁸ These universal ICT mechanisms will enable rapid dissemination of legal information to marginalised castes historically deprived of the means to access justice by providing effective knowledge and input-based legal information transcending through social, political and economic barriers. The ideas under the scheme have been called ASMITA (Alliance for Socially Marginalised Individuals through Technology in Action) to uncover the purpose that is to propose a merger of best facilities and technologies available for the upliftment of the socially marginalized individuals.

Some proposed ICT mechanisms are:

- SMS-based legal information providing
 - G SMS-based initiatives to inform citizens of various legal rights (constitutional, tribal, property etc.)—for eg., the 'UmNyango project' in South Africa trialled in 2006 using SMS to improve access to justice in rural and isolated areas and involved the setting up an "SMS gateway for two-way communication" so that the project could SMS information to participants and vice versa.
- Remote Access to Justice Initiatives
 - G Places operating without proximate courts, victims of violence can send text messages to towns with functioning courts and have their cases heard

⁹⁸ It is emphasized that this aspect of the Action Plan has deliberately chosen to propose recommendations based on the most basic universal information and communication technologies available currently, such that the implementation of such proposals remain as practicable and widespread as possible without incurring significant financial and adoptability burden thresholds.



In addition, the following measures may be undertaken for a greater reach beyond merely approaching the plans through access to justice lens:

- i. Regular awareness programmes and measures by NGOs and Social activists in places of relevance such as Hospitals, slums, educational institutions, public and private employment facilities to name a few.
- ii. A Research wing set up under the aegis of parliamentary sub-committees that would recommend appropriate backing and requirement of newer laws that can explore the contours of Articles 15 and 16 of the Constitution within enactments or Acts and have temporary measures in place, as the case may be.
- iii. Setting up a bi-annual Forum with all the District Magistrates, Retired judges and Social workers as a Committee involving the State and District State Legal Services Authorities to track the descent-based discrimination dealing with exogamous marriages, honour killings, private and public segregation, including in housing and education, access to public spaces, places of worship, and public sources of food and water and inability or restricted ability to alter inherited status to name the most prominent areas requiring attention.
- iv. Greater communication and participation with the State and National Human Rights Commissions by the SLSA and DLSA with a more incentivized approach by the NLSA to aid the Forum-Committee above by utilising the specific branches of the Human Rights Commissions such as Tribals, Women, protection of child rights Minorities, and Backward Classes.

The action plan for this scheme is divided into a three-pronged approach –

- the legal approach,
- data and digital measures
- a plan to raise awareness amongst all stakeholders.

The three approaches are detailed below.

I. LEGAL

- G Utilizing e-Seva Kendras which have been created under the aegis of the e-Committee of the Supreme Court, to enable litigants to obtain information with respect to case status and to obtain copies of judgments and orders. These centers also extend assistance in e-filing of cases.
- G To make legal aid easily accessible to marginalized persons of all strata and geographical regions
- G To inter-link the operation of Legal Aid Cells in Law Colleges/Universities at a national level to enable quicker access to legal aid
- G Setting up of special courts to deliver speedy redressal of grievances related to caste-based atrocities

II. DATA-RELATED

- G Inclusion of data regarding cases dealing with caste-based atrocities in the National Judicial Data Grid
- G Text messaging services, social media, television, etc. may be used for sharing information about the POA, and including helpline numbers to members of the SC/ST communities
- G Ties with CSC e-Governance Services India Ltd (provides delivery of services to citizens using Common Service Centers)
- G Ties with Case Information System (allows a litigant to view case details online)
- G Ties with Unified Mobile Application for New-age Governance (UMANG) (single platform for access to pan India e-Gov services.)
- G Develop e-Payment methods for court and administrative fees.
- G Removal of Habitual Offenders lists based on caste, which is available online

III. AWARENESS

- G To nurture flexible responses on inputs from marginalized persons in distress on the obstacles faced by them and on specific issues for improvement.
- G Inclusion of the community (in the form of Law colleges, NGOs) in the eradication of barriers to justice
- G Raising awareness regarding the protections afforded to members of the SC and ST communities under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 by way of governmental schemes
- G Increased representation of members of the marginalized groups in police and judicial forces
- G Seminars for awareness among authorities/stakeholders

E-COMMITTEE'S MARGINALIZED SECTION SUB COMMITTEE

Patron in Chief &: Hon'ble Dr. Justice Dhananjaya Y Chandrachud,
Chairperson The Chief Justice of India

Members: Hon'ble Ms. Justice Moushumi Bhattacharya, Judge, Calcutta High Court
Hon'ble Ms. Justice Prathiba Singh, Judge, High Court of Delhi
Ms. Jhuma Sen, Associate Prof. Jindal Global Law University

Convenor: R. Arulmozhiselvi, District Judge/Member, (Human Resources),
e-Committee, Supreme Court of India

Human
Community Participation Solidarity Work
Call Care **Dignity** Person **Rights** Workers
Creation Family Option Responsibilities
God's Life Option Vulnerable

**REPORT OF THE SUB-COMMITTEE ON
RECOMMENDED ACTION
FOR MARGINALISED SECTIONS OF THE SOCIETY**