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The Legal Tenability of Women's Exclusion from Combat Arms in the Indian Army

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ABSTRACT

This paper does a thorough analysis of the constitutional legitimacy and legal tenability of women's continued exclusion from the combat arms in the Indian Army, and attempts to predict the court's ruling in a likely scenario where a petition may be filed before the Supreme Court to direct the Union Government and the Indian Army to start inducting women in combat posts, especially motivated by the recent development of Permanent Commission. The goal of the paper is to close the generational gap by balancing traditional and contemporary methods and understanding the motivating factors behind each. It next analyses the difficulty presented by Article 33 and investigates further pertinent judicial precedents, regulations, reports, international treaties, and case studies in order to get a thorough understanding and strengthen the case for the hypothetical petition. Following that, the paper outlines the theoretical underpinnings of direct, indirect, and systemic discrimination, surveys comparative jurisprudence regarding the doctrines, and lays out the final road map for operationalizing indirect discrimination in Indian antidiscrimination law with references to the standards defined in the Lt. Col. Nitisha case. Lastly, the paper analyses the criteria necessary for applying the concepts of direct and indirect discrimination in order to demonstrate that the exclusion of women from Indian combat arms constitutes systematic discrimination within the Indian Army.

Keywords: Women, Exclusion, Combat arms, Indian army, Indirect discrimination.

I. INTRODUCTION

(A) History

The "Indian Military Nursing Service" was established in 1888, marking the beginning of the development of women's roles within the Indian Armed Forces. The Indian Army's nurses performed effectively throughout World War I. With the creation of the Women's Auxiliary Corps, which permitted them to serve largely in non-combatant jobs like communications, accounting, administration, etc., the contribution by women in the Indian Armed Forces was significantly improved. In order to find qualified workers for support roles, the British Army during the Second World War decided to start recruiting women in India. One member of the

¹ Author is a student at Symbiosis Law School, Pune, India.

corps, Noor Inayat Khan, distinguished herself throughout the war as a spy and became a legend. In order to cater for more men to be sent to sea, the Women's Royal Indian Naval Service started allowing women to work in jobs on land.^[2]

The 'Rani of Jhansi' Regiment, an all-female combat unit, was organised in July 1943 with the help of volunteers from the Indian expatriate community in South East Asia to fight alongside the Imperial Japanese Army in Myanmar during the time that Azad Hind Fauj was established by Subash Chandra Bose.^[3] The Army Act of 1950 prohibited women from receiving regular commissions, with few exceptions set down by the central government, until 1958, after the Army Medical Corps emerged as the first Indian Army corps to do so.

However, the doors to all three services were only opened to women towards the beginning of the 1990s. Women were first admitted into the three official military cadres in 1992 after the Union Government's 9 October 1991 announcement declaring them "eligible for appointment as officers" in Transportation, Law, and Education.^[4]

(B) Developments in the Three Decades Since

2008 saw the extension of permanent commission to women in the Army Education Corps (AEC) and JAG (Judge Advocate General) programmes.^[5] In 2015, India allowed women to fly fighter jets in new combat roles first three female pilots to be admitted into a fighter squadron of the Indian Air Force (IAF) comprised Flying Officers Avani Chaturvedi, Bhawana Kanth, and Mohana Singh from June 2016.^[6] Induction of female troops into the Corps of Military Police by the Indian Army commenced in 2019.^[7] In the Ladakh region, Col. Geeta Rana of the EME (Electronics and Mechanical Engineers) Corps recently became the first female commander to assume command of an autonomous field workshop.^[8]

More significantly, in 2020, the Supreme Court's rulings in the cases of *Union of India v. Lt.*

² Akshay Jain, *Women and Equal Opportunity in Indian Army: An Analysis with special reference to Combat Arms*, Vol. XIV ARMY INSTITUTE OF LAW JOURNAL, 13-27 (2021), <https://ail.ac.in/pdf/army-journal-2021.pdf>.

³ Indrani Sen, *Inscribing the Rani of Jhansi in Colonial 'Mutiny' Fiction*, Vol. 42, No. 19 ECONOMIC & POLITICAL WEEKLY, 1754-1761 (2007), <https://www.jstor.org/stable/4419581>.

⁴ Akanksha Sharma Pradeep Gupta, *Representation of Women in Indian Armed Forces*, ACADEMIA LETTERS, Article 647, (2021), <https://doi.org/10.20935/AL647>.

⁵ *Army open to permanent stint for women*, TIMES OF INDIA (Aug. 3, 2010, 00:40 AM), <https://timesofindia.indiatimes.com/india/army-open-to-permanent-stint-for-women/articleshow/6249665.cms>.

⁶ *India's first female fighter pilots pave way for more women in combat*, INDIA TODAY (Jun. 22, 2016) <https://www.indiatoday.in/india/story/indias-first-female-fighter-pilots-pave-way-for-more-women-in-combat-15653-2016-06-22>.

⁷ Karan Sethi, *Indian Army's Women Military Police: Marching ahead to pen an empowering chapter*, HINDUSTAN TIMES (Sep. 3, 2022, 07:43 PM), <https://www.hindustantimes.com/cities/delhi-news/indian-army-s-women-military-police-marching-ahead-to-write-an-empowering-chapter-101662213969940.html>.

⁸ *Col Geeta Rana becomes first woman officer to command EME unit near China border*, ANI NEWS (Mar. 9, 2023, 09:17 AM), <https://www.aninews.in/news/national/general-news/col-geeta-rana-becomes-first-woman-officer-to-command-eme-unit-near-china-border20230309091702/>.

Cdr. Annie Nagaraja^[9] and The Secretary, Ministry of Defence v. Babita Puniya^[10] opened the door for female army and navy officers to be entitled to Permanent Commission (PC), which ensures officers a lifetime career (up to the age of retiring) in the Armed Forces and additionally entails several perks like pension.

Additionally, in 2021, the Division Court, consisting of Sanjay Kishan Kaul and Hrishikesh Roy, JJ., issued a temporary directive allowing female applicants to sit the National Defence Academy (NDA) entrance test, which was previously solely authorised for the appointment of male personnel.^[11]

It is apparent that the fight for elevation of women's roles in the armed forces has occurred in a fragmented manner over the last three decades which, at this juncture, begs the reasonable question: Is the fight finally over?

That remains to be seen because, despite all the aforementioned advancements, women are still not permitted to join the combat units of the Indian Armed Forces. Women are not permitted to serve in combat roles in the Indian Army, except when the Central Government issues a notification in the Official Gazette, according to Section 12 of the Army Act of 1950. This is protected by Article 33 of the Constitution, which gives Parliament the authority to decide by law the extent to which the fundamental rights granted under Part III of the Constitution ought to be curtailed or eliminated when applied to members of the armed forces.

India is a signatory to the 1953 Convention on the Political Rights of Women, but after ratifying the Convention, it made the following declaration: "*Article III of the Convention shall have no application with respect to recruitment to, and conditions of service in any of the Armed Forces of India or the Forces charged with the maintenance of public order in India.*"

Despite the fact that women have been involved with the Armed Forces of the nation for more than three decades, their opportunities for employment are limited to supporting armaments and services.

There are a variety of factors that contribute to the separation of women from men in support roles. These include sociological factors because the population of any nation's armed forces is drawn from that society, and as a result, attitudes and beliefs from that society are reflected in the culture and operations of the Armed Forces; psychological variables because society holds the belief that there are innate emotional differences between the sexes; and financial factors

⁹ (2021) 1 SCC (L&S) 169.

¹⁰ (2020) 7 SCC 469.

¹¹ Kush Kalra v. Union of India, Writ Petition(s) (Civil) No.1416 of 2020.

because providing exclusive structures and amenities for women is expensive.

Furthermore, physiological considerations are used to justify the lack of inclusion of women in combat fields since they are demonstrably weaker than men. Further, conventionally only men have served in the world's armed forces, and there is minimal precedent for incorporating women in battle. In addition to these, a number of various connected factors are addressed subsequently.

A Public Interest Litigation (PIL) for awarding a writ of mandamus to the Union Government and the Indian Army to make room for women in combat posts is quite likely to be launched before the Apex Court within the next ten years given the recent development of Permanent Commission. By doing a thorough analysis of the constitutional legitimacy and legal tenability of women's continued exclusion from the combat arms in the Indian Army, this article attempts to predict the court's decision in such a scenario.

(C) Objective

To examine the constitutional validity and legal tenability of women's exclusion from combat arms in the Indian Army.

(D) Research Methodology

The research paper has been corroborated based on secondary data collected from different sources which were accumulated from number of research papers, articles, books, online databases, and websites. The research method used in this study for exploration of data which amassed from different sources is Doctrinal Research Methodology.

The paper restricts itself to assessing the circumstances in India in light of the key provisions of the listed special laws and constitutional clauses. It also draws heavily on different legal precedents to interpret the ratio decidendi and obiter dicta of such judgements.

II. SECTION 12 OF THE ARMY ACT, 1950

Section 12 of the Army Act of 1950 declares women to be ineligible for combat duties (and, until recently, permanent army appointments) in the Indian Army unless the Government of India issues a notification stating otherwise via the Official Gazette.^[12] This provision has already been thoroughly analysed in the case of *Secretary, Ministry of Defence v. Babita Puniya*, which leads the author to believe that the bench will undoubtedly refer to the case's precedential blueprint to ascertain violations, if any, with regard to submitting the constitutional validity of

¹² The Army Act, 1950, § 12, No. 46, Acts of Parliament, 1950 (India).

combat exclusion of women in the Indian Army to judicial review.^[13]

Section 12 was the key section contested in this case regarding the appointment of women to permanent commissions, as it was contended that it violates the right to equality given by Article 14 of the Indian Constitution. Article 33 of the Indian Constitution was also considered, as it allows the Parliament to restrict the fundamental rights of Army personnel as a way to make certain that they accomplish their tasks effectively and with discipline.

As a result, the petitioners argued in support of Section 12 of the Army Act, 1950 under Article 33 of the Indian Constitution, citing a disparity in multiple variables such as physical and psycho-social requirements between male and female officers as the rationale for the latter's inability to obtain permanent commission.

The respondents, on the other hand, contended that Section 12 of The Army Act, 1950 is unconstitutional under Articles 14, 15, and 16 of the Constitution, noting not just the criteria for granting permanent commissions but also the prohibition on women serving in combat roles. A legislative classification's validity must be rational and based on some real and substantive distinction that is properly related to the necessity or object for which the categorization has been developed and that could not be deduced from the petitioners' claims.

Let us take a deeper dive into these constitutional provisions and how the Court addressed the issue of them being at loggerheads with each other.

III. CONSTITUTIONAL PROVISIONS: CLASH AND CONFLICT

All laws enacted in the country must be consistent with the provisions outlined in the Indian Constitution. Furthermore, no statute should contradict the constitutional rights guaranteed by the Constitution.

The Government of India has codified gender equality principles in Part III in the Indian Constitution, namely the Fundamental Rights of Articles 14, 15, and 16. The right to equality under Article 14 has a broad scope and includes a reasonable or genuine expectation in all citizens to be regarded fairly in their interactions with the State and its agents, as well as equality of status.^[14] Article 15 stipulates that no citizen of India may be discriminated against solely on the basis of religion, race, caste, gender, or place of birth.^[15] Furthermore, Article 16 specifies that all citizens shall have equal chance in issues relating to being employed or appointed to any

¹³ (2020) 7 SCC 469.

¹⁴ INDIA CONST. art. 14.

¹⁵ INDIA CONST. art. 15.

office of the authority of the government.^[16]

However, an impediment emerges in the absence of Article 33 of the Constitution, which authorises Parliament to determine by law the extent to which the fundamental rights granted by Part III of the Constitution shall be modified or abolished in regards to their application to personnel in the Armed Forces.^[17]

In recent years, the Apex Court has been asked to rule on the subject of fundamental rights conflict, and it has resorted to employing the “Balancing Test.” The purpose of basic rights balance is to ensure that the most important collective interest, or the greater public good, is safeguarded.^[18]

Hence, in the *Babita Puniya* case,^[19] when the Union of India and the Indian Army attempted to dispute the legality of the petitions seeking equal treatment in the grant of commission by claiming that the stipulations of the Army Act are safeguarded under Article 33, the Supreme Court declared that non-intervention would be an injustice to the petitioners, and thus the bench dismissed the respondents' contention.

The Court ruled that Article 33 can only be used to ensure discipline and the discharge of members' obligations and not in any other situation, and thus this Article cannot be used to address inequities in recruitment in the Armed Forces. It is worth noting that the court applied the literal approach to statute interpretation in this issue because Article 33(d) expressly indicates that clauses (a) to (c) are only applicable in the situations listed above. As a result, the court relied on a stringent literal interpretation, which avoided ambiguity while simultaneously maintaining justice. Furthermore, gender inequity could never be the legislature's objective, so the court stuck to the plain interpretation of the words. The court stated that the Indian Constitution is feminist in essence since it tries to alter societal hierarchies.

Having tackled the obstacle posed by Article 33, what remains is ascertaining that the *rule of combat exclusion of women* is discriminatory under Articles 14, 15 and 16. However, the application of tests and principles to prove the same ought to be done after only delving into other relevant judicial precedents, policies, reports, international conventions, and case studies, thereby gaining an in-depth understanding to create a stronger argument in favour of the hypothetical petition.

¹⁶ INDIA CONST. art. 16.

¹⁷ INDIA CONST. art. 33.

¹⁸ Nikhil Pratap, *Conflicting Fundamental Rights Under the Indian Constitution: Analyzing the Supreme Court's Doctrinal Gap*, COLUMBIA LAW SCHOOL LL.M. ESSAYS AND THESES, (2022), https://scholarship.law.columbia.edu/llm_essays_theses/7.

¹⁹ *The Secretary, Ministry of Defence v. Babita Puniya*, (2020) 7 SCC 469.

IV. JUDICIAL PRECEDENTS

We have previously examined the case of *The Secretary, Ministry of Defence v. Babita Puniya & Ors*^[20] (in which women with Short Service Commissions in the Indian Army sought to secure permanent commission) because it is the most pertinent judicial precedent in Indian Courts for reference relating to combat exclusion of women in the Indian Army.

Let us look at few more precedents with similar discriminatory laws affecting employed women in India.

1. **Kush Kalra v. Union of India and Ors**^[21]

This case dealt with the State's institutional discrimination against women by refusing to enlist them into the Indian Territorial Army based on an erroneous reading of Section 6 under the Indian Territorial Army Act, 1948.

The court held that in interpreting the expression “he,” reference must be made to Section 13 of the General Clauses Act, 1897, which states that in all Central Acts and Regulations, words importing the sex of men are to be interpreted to encompass females unless there is anything objectionable in the subject matter or context. As a result, under Section 6 of the Indian Territorial Army Act, 1948, women are qualified for enlistment and service under the Territorial Army. There has been no logical reasoning presented to support or justify the respondents' behaviour in enforcing a ban on female enrolment through their ads.

The contested advertising, to the degree that they bar women from employment in the Territorial Army, violated Articles 14, 15, 16, and 19(1)(g) of the Indian Constitution and were annulled.

2. **Annie Nagaraja & Ors. v. Union of India & Ors.**^[22]

The High Court adjudicated upon six writ petitions submitted by 70 women officers who joined the Indian Navy as Short Service Commissioned officers in various areas such as Education, Logistics, and ATC demanding opportunity of permanent commission.

The court concluded that the petitioners, like male officers, had gone through the same training but were denied permanent commissions, whereas the men were awarded permanent commissions based solely on their gender. The court ruled that this was equivalent to gender-based discrimination and determined that the 2008 policy of the defendants, which did not provide permanent commissions to female officers who had served as Short Service

²⁰ (2020) 7 SCC 469.

²¹ Writ Petition(s) (Civil) No.1416 of 2020.

²² (2020) 13 SCC 1.

Commissioned officers for 14 years, as illogical and a blatant form of discrimination. As a result, the petitioners were granted appropriate remedies.

3. C.B. Muthamma, I.F.S. case ^[23]

The petitioner challenged Rule 8 of the Indian Foreign Service (Conduct and Discipline) Rules, 1961, which required a woman member of the service to acquire written permission from the government before marrying. The regulation additionally provided that a woman member of the service may be obligated to resign from service at any point following marriage if the government proves that her family and domestic responsibilities are likely to interfere with the prompt and effective discharge of her job responsibilities as a member of the service. On the petitioner's appeal to this provision as a violation of Articles 14 and 16 of the Indian Constitution, the Supreme Court issued the following observations in the judgement written by Krishna Iyer, Judge for the Bench:

- If a man who is married has a right, a married woman has a disadvantage as a result of the male culture of manacling the less powerful sex, which forgets that the war for national liberation was also a battle contrary to woman thralldom.
- If the administration, as the proxy of Parliament, sets rules in violation of Part III (fundamental rights), especially when high political office, including diplomatic assignments, is held by women, the conclusion of a vehement opposition to gender equality is unavoidable.
- Men and women have equal rights in all jobs and settings; yet, sex sensitivities, sociocultural sector idiosyncrasies, or limitations of either sex may require deliberate selection. However, even where distinction is obvious, the norm of equality must apply.

Apart from the aforementioned, in certain **other cases** such as that of *Anuj Garg v. Hotel Association of India*,^[24] *Charu Khurana v. Union of India*^[25] and *Valsamma Paul (Mrs) v. Cochin University*,^[26] the Supreme Court ruled and affirmed that discrimination is being sought on the ostensible basis of categorization, and that such classification must be established on logical grounds. In the lack of any constitutional instrument, the criteria that applied to social situations in the early twentieth century may not be sensible standards in the twenty-first century. The court called attention to the fact that women in India became increasingly accepted in both police and army roles over the past 60 years, have participated in grassroots democracy,

²³ Miss C.B. Muthamma, I.F.S. v. Union Of India And Ors., (1979) 4 SCC 260.

²⁴ AIR 2008 SC 663.

²⁵ (2015) 1 SCC 192.

²⁶ AIR 1996 SC 1011.

and have acquired access to all areas of public life. As a result, the Court determined that denying a woman access to work or a specific service on the basis of her gender constitutes a clear infringement of her right to equality and a denial of her ability to support herself, both of which have an impact on her sense of personal dignity.

4. United States v. Virginia^[27]

In terms of international law, one of the most significant cases is *United States v. Virginia*. In this case, the United States Supreme Court declared the following findings in determining whether Virginia Military Institute's (VMI) admission policy, which admitted a majority of men, violated the Equal Protection Clause from the 14th Amendment to the American Constitution:

- Parties attempting to support a government action based on gender must provide extremely convincing evidence in order for the action to pass an equal protection examination.
- Increased scrutiny must be applied to all gender-based categories.

The court concluded that there is no reason to believe that the admission of women who are capable of carrying out all the tasks required of VMI cadets will cause the Institute to fail because the history of the promotion of constitutional rights and freedoms to people who were once neglected or excluded is a significant part of the history of the Constitution of the United States.

V. PRINCIPLES OF DIRECT, INDIRECT AND SYSTEMIC DISCRIMINATION

The prayer for inclusion of women in combat arms is likely to be filed in light of Article 14, Article 15(1), and Article 16 of the Constitution of India. However, it is pertinent to note that while the ambit of antidiscrimination laid down in these provisions differ from one another, the contention to further elevate female officers' roles in the Indian army warrants proving of existence of two forms of discrimination i.e., direct, and indirect discrimination; based upon which can the petitioners ultimately seek to equate such exclusion to systemic discrimination.

In order to achieve this, the author shall first outline the theoretical foundations of direct, indirect, and systemic discrimination, survey comparative jurisprudence concerning the doctrines and lay down the final roadmap for operationalizing indirect discrimination in Indian antidiscrimination law with references to the standards laid down in *Lt. Col Nitisha v. Union of*

²⁷ 518 U.S. 515 (1996).

India.^[28]

In the final segment, the author shall analyse the exclusion of women from combat arms in the Indian Army in light of the legal questions surrounding the application of the aforementioned antidiscrimination tests. The author aims to successfully apply the standards of justification required to invoke the doctrines of direct and indirect discrimination, so as to prove that such exclusion amounts to systemic discrimination within the Indian Army.

VI. BASIC JURISPRUDENCE EMBEDDED IN INDIAN CONSTITUTION

Fundamentally, this case offered the Court an opportunity to select between formal equality and substantive equality as conflicting interpretations of the antidiscrimination guarantee included in Articles 14 and 15(1) of the Constitution.

Sandra Fredman does a good job of capturing the formal framework of antidiscrimination law in her book, *Discrimination Law*^[29]: All that the law asks is that likes be treated equally under the formal and symmetrical understanding of antidiscrimination law, commonly known as direct discrimination. According to this interpretation, equality lacks any real foundation. It is predicated on the idea that consistency in treatment is necessary for justice. This approach does not consider the fact that some protected groups are disproportionately and negatively affected by the operation of the relevant law or its application.^[30]

Whereas the substantive notion of anti-discrimination law, often known as indirect discrimination, forbids the careless adoption of policies and procedures that look neutral but in fact support and uphold an unfair status quo.^[31]

A pattern resulting from various axes of discrimination may not be well explained by sole reliance on instruments of direct or indirect discrimination. As a result, a systemic perspective on discrimination would consider both unjust action and inactivity by viewing discriminatory drawbacks as a continuum. Organisational or other structures would be examined for the systems or cultures they foster that affect daily interaction and decision-making.^[32]

(A) International Jurisprudence

In the United States, Chief Justice Burger interpreted the anti-discrimination provisions of Title

²⁸ 2021 SCC OnLine SC 261.

²⁹ SANDRA FREDMAN, *DISCRIMINATION LAW* p.8 (2nd ed. 2011).

³⁰ Nicholas Bamforth, *Conceptions of Anti-Discrimination Law*, Vol. 24, No. 4 OXFORD JOURNAL OF LEGAL STUDIES, 693-716, (2004), <https://www.jstor.org/stable/3600533>.

³¹ Marie Mercat-Bruns, *Systemic discrimination: Rethinking the Tools of Gender Equality*, Vol. 2 EUROPEAN EQUALITY LAW REVIEW, 5-6, (2018).

³² Tristin K. Green, *The Future of Systemic Disparate Treatment Law*, Vol. 32(2) BERKELEY JOURNAL OF EMPLOYMENT AND LABOUR LAW, 400-454, (2011).

VII of the Civil Rights Act of 1964 and held that neutral or non-discriminatory intent does not absolve employers from liability for hiring practises or testing policies that create "built-in headwinds" for minority groups and are unrelated to evaluating job capability. If an employment practise that excludes people of colour cannot be linked to work performance, it is unlawful.^[33]

Essop v. Home Office (UK Border Agency)^[34] is a UK Supreme Court ruling in which the Court stated that achieving equality of treatment is the goal of direct discrimination. In contrast, indirect discrimination aims to level the playing field by identifying and removing unspoken barriers that disproportionately impact a particular group, absent a legally permissible justification. A defendant can always refute an indirect discrimination claim by demonstrating that the provision, criterion, or practise (PCP) in question has a sound legal basis.

In Action Travail des Femmes v. Canadian National Railway Company,^[35] the Supreme Court of Canada noted that systemic discrimination in the workplace is amplified by the very exclusion of those who are marginalised because it encourages the idea that the exclusion is the result of "natural forces" both inside and outside the group. In order to prevent systematic prejudice, it is crucial to provide an environment where harmful behaviours and viewpoints may be contested and condemned.

VII. INDIAN JUDGEMENTS – APPLICATION OF DISCRIMINATION TESTS

A crucial development in the Indian constitutional law's interpretation of Articles 14 and 15(1) has been the notion of substantive equality and anti-stereotyping. The Indian Supreme Court has often expressed its support for the spirit of these ideas.

In the case of Anuj Garg v. Hotel Association of India,^[36] which dealt with direct discrimination, the Supreme Court determined that regulations based on sexist stereotypes are unconstitutional since they are antiquated in intent and oppressive in practise. It was asserted that obstacles to women's full and full citizenship must be removed rather than used to support an unfair status quo.

In Navtej Singh Johar v. Union of India,^[37] Chandrachud J. drew on the Delhi High Court's decision in Naz Foundation v. Government of NCT of Delhi,^[38] which had relied on the "Declaration of Principles of Equality" issued by the Equal Rights Trust Act in 2008 in

³³ Griggs v. Duke Power Co, 401 US 424, p. 431 (1971).

³⁴ [2017] UKSC 27.

³⁵ (1987) 1 S.C.R. 1114.

³⁶ AIR 2008 SC 663.

³⁷ (2018) 10 SCC 1.

³⁸ (2009) 111 DRJ 1 (DB).

recognising that indirect discrimination arises whenever a PCP would put people having a status or a trait associated with one of the protected classes at a disadvantage.

The five pillars required that govern indirect discrimination in Indian law were outlined by Justice Chandrachud in the case of *Lt. Col. Nitisha & Ors v. Union of India & Ors*^[39]:

- 1) To start, prejudice can result from both conscious and unconscious biases, as well as from preexisting structures that uphold an unfair status quo.
- 2) In addition, regardless of purpose, indirect discrimination occurs when unjust treatment has an effect.
- 3) Third, the requisite proof may, but need not, be statistical or exceed a certain quantitative threshold.
- 4) A two-step investigation should be carried out, drawing on *Fraser v. Canada*^[40] as a precedent. The Court must consider whether the legislation "reinforces, perpetuates, or exacerbates disadvantage" in addition to whether it has a disproportionate impact on a specific population.
- 5) Fifth, the evaluation of an indirect discrimination claim should determine if the measure is required for "successful job performance" and whether less discriminatory options are available.

As a conceptual tool, indirect discrimination, when combined with direct discrimination, results in systemic discrimination, for which remedies cannot end with compensation and the law cannot end with the abolition of discriminatory practises, according to Justice Chandrachud. The Court ought to be allowed to go above and beyond to establish beneficial change that can alter these systems.

VIII. ANALYSIS

(A) Dismantling Archaic Contentions

1) "Women are physiologically weaker than men"^[41]

Women in combat jobs are opposed because it is believed that they will jeopardise national security since they are not as powerful and violent as men. The underlying drawback of such a perspective is that it assumes that all men are strong and aggressive, whereas all women are

³⁹ 2021 SCC OnLine SC 261.

⁴⁰ 2020 SCC 28.

⁴¹ Prem Chowdhry, *Women in the Army*, Vol. 45, No. 31 ECONOMIC & POLITICAL WEEKLY, 18-20 (2010), <https://www.jstor.org/stable/20764357>.

weak. According to tests, most women may significantly enhance their physiological capabilities and be as robust as their male counterparts with sufficient training. Individual characteristics such as endurance and toughness must be determined.

2) “Women lose attention from duty due to pregnancy” ^[42]

Small families are the norm in today's modern society, and requests for maternity leave are not as uncommon. Being a mother is just another medical condition that temporarily hinders one's fitness, and women do recover and resume their old levels of fitness and employment. Women have been juggling demanding careers with long hours and household responsibilities. Therefore, the possibility of pregnancy is hardly a sufficient justification to exclude women from combat roles.

3) “There is less threat to life in support roles” ^[43]

Women are often employed in a variety of support tasks in the field, but not in units that are operationally committed or are under enemy threat. The logic of such exclusions ignores the fact that contemporary warfare is a 360-degree conflict, with frontlines that engulf entire regions and are unpredictable and variable. For instance, during the Gulf War, Saddam Hussein's Scud missile attack killed 11 more female troops than in a typical close-quarters engagement, showing that while a combat exclusion policy may bar women from offensive operations, it does not really bar them from dangerous combat zones.

4) “Women undermine male bonding” ^[44]

The inclusion of women in military units is perceived as weakening morale, unit cohesiveness, and the vulnerable male solidarity. Male officers also frequently hold the opinion that it would be challenging for males to accept women as leaders given the rural backgrounds and lesser levels of education of our troops. But this is far from reality, since males in the ranks often accept women as leaders. They assess officers by their rank, not their gender, thanks to the rigid line of command and the strong ideals instilled throughout training. The 21st century's progressive environment has guaranteed that men in the military are currently desensitised to the presence of women; officers and soldiers alike see them as people of their own and their gender is immaterial to them.

⁴² *Ibid.*

⁴³ Major General Mrinal Suman, *Women in the Armed Forces - Misconceptions and Facts*, ESAMSKRITI (Jun., 2011), <https://www.esamskriti.com/e/NATIONAL-AFFAIRS/Women-in-the-Armed-Forces--Misconceptions-and-Facts-1.aspx>.

⁴⁴ *Ibid.*

5) “Women encourage improper romantic liaisons” ^[45]

The impact of women's participation on unit cohesion has been minimal in the Support Arms and Services of the Indian Armed Forces under the current conditions. As the last ten years' experience has demonstrated, these conflicts between men and women are negligible in a task-oriented setting. Furthermore, this reasoning is flawed since it can be limited to only heterosexual couples. Men and women may learn to work in teams without allowing improper interactions get in the way with practise, time, and a supportive albeit disciplined organizational environment.

6) “Women lack aggression to fight wars” ^[46]

All troops, male or female, have an inherent drive for self-preservation in times of battle. It is at best a very debatable topic as to whether violent behaviour is just incidental, encouraged by societal conditioning and tradition, or brought on by nature. Since both men and women may be trained to behave aggressively, the effects of training cannot be dismissed. More than hormones or physical power, combat is a mental game. Living on the brink of danger requires a certain mindset or temperament, not a masculine or female attitude. While some women are really determined, other males are just not up to the demands of warfare.

7) “Women could be taken as Prisoners of War” ^[47]

Men and women who enlist for the Armed Forces do so voluntarily and intentionally, acknowledging the risk of death or the potential for arrest, rape, and torture. They consciously choose to do so, fully aware of the professional risks involved, and it is embraced in a similar vein. At least three women have died while carrying out their responsibilities in the Indian Armed Forces. The brave women's sacrifice strengthens the will of women to assume equal dangers and duties in the nation's defence.

IX. APPLICATION OF PRINCIPLES OF DISCRIMINATION

For analysis from the framework of systemic discrimination (which encompasses indirect discrimination) to determine a constitutional violation, a study of the systemic impact of the prolonged denial of combat roles to women and the evaluation structures and patterns therein,

⁴⁵ Harinder Barweja, *Women in the armed forces: challenges, triumphs and male response*, Hindustan Times (Feb. 8, 2015, 07:14 PM), <https://www.hindustantimes.com/india/women-in-indian-armed-forces-challenges-triumphs-and-male-response/story-q8fz7kJwCLGpx97aig9MCM.html>.

⁴⁶ Sneesh Alex Philip, *Women in Combat Roles: India can romanticize it but here's why we are not ready yet*, THE PRINT (Feb. 14, 2020, 08:32 AM), <https://theprint.in/opinion/brahmastra/women-in-combat-roles-india-can-romanticise-it-but-heres-why-we-are-not-ready-yet/365104/>.

⁴⁷ Ashwarya Sharma, *Right to Equality and Gender Stereotypes in the Indian Army*, Vol. 5 INTERNATIONAL JOURNAL OF LAW MANAGEMENT AND HUMANITIES, 458-479, (2021), <https://doi.org/10.1000/IJLMH.113579>.

would be indispensable.^[48]

The five principles to apply indirect discrimination in Indian law are as follows—

- 1) Consequence of unconscious biases and existing structures that perpetuate an unjust status quo

There is no evidence to support the assumption that allowing women into combat arms will in any way undermine military culture, just as allowing them into other armed services groups did not compromise it. In various situations, some women and men are more productive than other women and men. The pool of qualified candidates for delicate and sensitive positions requiring interpersonal skills doubles if women are allowed to serve.

- 2) There is an effect of unfair treatment, irrespective of intent

Making decisions at the top-down level is not always successful, especially if the societal biases present at the local level in rural and semi-urban regions are not thoroughly recognised. The general ban on women restricts commanders' ability to choose the best candidate for the post. To ease the incorporation of women into combat formations, training will be needed. The masculine subculture may vary as cultures do over time.

- 3) Evidence required can, but need not necessarily be, statistical or cross a particular quantitative threshold

Since India has not fought a significant war since the recruitment of women officers began, one can only speculate on the role of women in the event of war in the Indian setting. The restricted engagement in Kargil is not a good example because it was confined to a small region, lasted for a short time, and did not mobilise the nation's full military forces. Because there is no actual information on the matter due to a lack of trials, research, or experience, the discussion of women in battle in the Indian setting is still only theoretical.

- 4) There is a disproportionate effect on a particular group and the law has an effect of 'reinforcing, perpetuating or exacerbating disadvantage'

Another claim concerned pregnancy and motherhood, and Justice D.Y. Chandrachud stated in the case of *Air India v. Nergesh Meerza*^[49] that he believed the claims to be stereotypical and in violation of Article 14's basic right to equality. One's gender is irrelevant provided they meet the requirements for the position. Advocates for women in the military contend that the average woman spends a relatively tiny percentage of her productive life pregnant. More significantly,

⁴⁸ Lt. Col Nitisha v. Union of India, 2021 SCC OnLine SC 261.

⁴⁹ 1981 AIR 1829, 1982 SCR (1) 438.

generalising is wrong because some women may not even desire to have children and should not be unfairly denied an option based only on an aggravating presumption.

- 5) The measure in question should be necessary for 'successful job performance' unless less discriminatory alternatives exist

We cannot deny that the environment, security perception, and capabilities of women are changing in today's battle, which emphasises psychological fortitude over physical prowess. The military is also gravely concerned about declining retention and recruiting rates. By permitting women to participate in battle, this issue may be resolved. The army must have also conducted a thorough investigation of the socioeconomic issues that affect the recruitment of female troops. The authority granted to a woman officer by virtue of her position protects her to a significant extent.

Although the aforementioned arguments were neutral on the surface, in practise they discriminated against women and continued the negative repercussions of earlier exclusion. As a result, it has now been proven indisputable evidence that women's exclusion from combat armaments in the Indian Armed Forces is neither lawful nor acceptable.

X. SCHEME OF EQUALITY IN INDIA AND ACROSS THE GLOBE

It is important to keep in mind that, as stated in *State of Kerala v. N.M. Thomas*,^[50] the goal of Articles 14, 15, and 16 under the equality plan has always been to establish actual equality. In the *Babita Puniya case*, it was made clear that Article 33 only applies when maintaining discipline and carrying out the officers' responsibilities properly are necessary. As a result, it should not be employed for any other reason. In order to ensure justice and avoid ambiguity and absurdity, the court relied on a strict literal reading.

It is noteworthy that the Indian Air Force has accepted women into every position, where they carry out their responsibilities as pilots, navigators, technical officers, and ground duty branch officers alongside their male colleagues in the fighter stream as fighter controllers.^[51]

On a global scale, it is pertinent to consider The Women's Armed Services Integration Act, 1948, a United States law authorising women to serve in the Army, Navy, Marine Corps, and the Air Force as permanent, regular armed forces members; as well as how women in Israel joined combat arms in 1995 as a response of High Court of Justice to Israeli feminist groups

⁵⁰ 1976 AIR 490, 1976 SCR (1) 906.

⁵¹ Rahul Singh, *In a first, woman officer said to take charge of an IAF Combat unit*, MINT (Mar. 7, 2023, 11:41 PM), <https://www.livemint.com/news/india/in-a-first-woman-officer-set-to-take-charge-of-an-iaf-combat-unit-11678212686282.html>

demanding their recruitment into the Israel Defence Force combat arms.^[52]

Having established that the contentions of the Defence Ministry do not satisfy the requirements of indirect discrimination, it becomes obvious that unless these unfounded barriers against are removed, the conduct of Indian Armed Forces shall be in dissonance with mandates of policies and reports such as:

- *Reports by the Committee on the Status of Women in India, 1971*
- *National Policy for the Empowerment of Women, 2001*
- *Draft National Policy for Women, 2016*
- *Report of the High-Level Committee on Status of Women, 2015*

Additionally, it can neither be said that the State is adhering to Article 51 of the Constitution regarding its foreign policy of appropriate enforcement of International Laws such as:

- *The Convention on the Elimination of All Forms of Discrimination against Women, 1981 (CEDAW)*^[53]

On July 9, 1993, India adopted CEDAW, setting a national agenda for the State Parties to abolish gender discrimination in India. According to Article 11 of the Convention, States Parties are required to take all necessary steps to end discrimination and guarantee that men and women have equal access to work opportunities, including equal rights to advancement and job security. States Parties must also stop discrimination against women due to maternity leave, pregnancy, or marital status.

- *Convention on the Political Rights of Women, 1953*^[54]

While India is a signatory, upon ratification, it declared that “Article III of the Convention shall have no application as regards recruitment to, and conditions of service in any of the Armed Forces of India or the Forces charged with the maintenance of public order in India.”

Additionally, the implementation of Resolution 1325 and the associated United Nations Security Council resolutions prompted NATO to examine the role of female military personnel in overseas operations, explicitly highlighting the significance of integrating the gender perspective at all stages of planning and carrying out an overseas operation and describing in detail the required pre-deployment training on the gender dimension to be given to all military

⁵² Wangchu Lama and Savin Paul, *Women Empowerment in the Indian Armed Forces*, (2020), https://link.springer.com/referenceworkentry/10.1007/978-3-319-70060-1_145-1.

⁵³ UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm>.

⁵⁴ UN General Assembly, *Convention on the Political Rights of Women*, 20 December 1952, <https://www.refworld.org/docid/3ae6b3b08.html>.

personnel.

XI. RECOMMENDATIONS

It is critical to keep in mind the following points in order to establish a system that will allow more women to eventually join the armed forces:

1. Reasons for Exclusion cannot be justified through mere conjecture

Despite rhetoric, the only practical course of action is to test a particular model rather than dismiss it based only on presumptions. Instead of excluding a group of potential employees because they do not belong to the conventionally superior sex, physical, psychological, and field experience, exams are what will demonstrate who makes a better soldier. India should conduct trials and research to determine how to effectively use its female workforce and provide openings for a select group of professional female combat soldiers.

2. Induction based on equivalent criteria for both

If women meet the physical and professional requirements, eventual induction into the Indian Army's fighting forces may be considered. The Indian Armed Forces ought to be carrying out tests and research to see how it can effectively utilise the might of its women and create possibilities for a select group of accomplished women to engage in combat with soldiers. They do not ask for any favours or concessions based on gender or pampering. Nothing about these issues is insurmountable that cannot be handled internally by taking the necessary actions.

3. Training versus Custom

To ease the incorporation of women into combat formations, training will be needed. As cultures change over time, so can the masculine counterculture. The capacity of commanders in the battlefield to select the most qualified candidate for the job is constrained by an arbitrary blanket ban on women. Furthermore, as equality is a constitutional promise, it is crucial to recognise that every woman has the right to follow a career of her choosing and succeed in it.

4. Independent mechanism for resolving complaints

An independent grievance is the most important thing right now. Within the confines of organisational structure, appropriate field areas and sufficiently substantial appointments can be developed to provide the female officers an optimal field- peace description.

5. In Sync With Global advancements

In 2013, women were given the legal right to serve in combat roles in the American military,

which was generally hailed as a victory for gender equality.^[55] Women were formerly prohibited from engaging in close combat ground roles, but the UK military abolished this restriction in 2018, allowing women to join the elite special forces.^[56] In addition, among the forces throughout the world that meaningfully utilise women in front-line combat roles are France, Germany, the Netherlands, Australia, Canada, etc. It is time for India to catch up to these foreign advancements in order to advance both women's rights and the calibre of human capital resources available to Indian army combat units.

XII. CONCLUSION

Every army serves as a symbol for a nation's social, cultural, and historical predispositions. Many social sciences refer to the military as a perfect depiction or the mirror image of a nation. The societal influences that were present throughout the members' formative years prior to enlisting in the military have an impact on how the military operates and what it does. It is well acknowledged that the military was not designed to produce amplifications, so this fact has little to do with gender parity. They just require personnel who were both physically fit and mentally tough to survive the hardships of battle. The cohesiveness, mutual confidence, and leadership conviction of a force all contribute to its fighting potential. Nothing ought to be done to compromise these qualities.

Litigating one's right to a job with equal opportunity and respect in India, where the majority of the population faces many forms of marginalisation, may seem like a distant dream. But it is really hoped that a perception of systemic discrimination will enable those who serve in the military to exercise their right to equality and dignity.

Today, women and men both participate in war. The forces need the best men and women in order to be most effective. The argument is that women should have the opportunity to attempt the tests required to fulfil further conventional duties. Her horizons shouldn't be limited by any rule, custom, or institution. She ought to have the freedom to rise as far as she wants to as a liberated human being.

⁵⁵ Jerry Votava, *US military to permit women to serve in combat units*, JURIST (Jan. 24, 2013, 03:22 PM), <https://www.jurist.org/news/2013/01/us-military-to-permit-women-to-serve-in-combat-units/>.

⁵⁶ David Bond, *UK Military lifts ban on women in close combat roles*, FINANCIAL TIMES (Oct. 26, 2018), <https://www.ft.com/content/7cfc69b8-d86f-11e8-a854-33d6f82e62f8>.

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