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# **CRITICAL ANATOMY OF CONSTITUTIONAL PROVISIONS VIS A VIS GENDER EQUALITY**

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## **Abstract:**

I am no bird and no net ensnares me: I am a free human being with an independent Will

- Charlotte Bronte and Jane Eyre

Women hold up half the sky and hence gender equality plays a crucial role towards the progress of any country and to safeguard the human rights at all stages. When we talk about Gender equality, we mean a society wherein both women and men having equal opportunities, rights and responsibilities in various domains of life .But when we look into the factual position, women have always been discriminated against men and have been subjected to all kind of inequalities since ages.

Extensive inequality persisted in the society despite several goddesses been worshipped in our country. Many factors cause gender inequality such as incomplete coherence of skills where women and men should be on equal footing be it education, health, or nutrition field, absence of economic independence, lack of employment opportunities, less participation in decision- making and male dominance.

Notably the scenario has changed after the introduction of Indian Constitution which not only grants equality to women but also empowers the state to adopt positive measures in her favor for neutralizing the cumulative socio-economic, educational and political disadvantages faced by her. India has also taken some measures on human development including ratification of multiple International declarations and conventions, most significantly Convention on Elimination of Discrimination against women(CEDAW) but still India's global standing on gender equality remains low as it ranks 140th among 156 countries in the **The World Economic Forum's Global Gender Gap Index** Report of 2021.

On this background, an attempt would be made by the researcher to highlight this major issue faced by the nation today, the Constitutional and legal provisions relating to the gender equality and to recommend various measures to reinforce gender equality.

**Keywords:** Gender equality, discrimination, inequality, Indian constitution, measures.

When we talk about Gender equality, we mean a society wherein both women and men having equal opportunities, rights and responsibilities in various domains of life. Gender equality is crucial for the progress of any country and to safeguard the human rights at all stages. But when we look into the factual position, Women have always been discriminated against men and have been subjected to all kind of inequalities since ages. Male domination with a complementary suppression of women has been continuing since pre-historic times. Woman has suffered and is suffering discrimination quietly still subjected to disparity and discernment at all stages of life. Discrimination affects the human capabilities in any form. The root cause for discrimination of women is also the ignorance on their part about the rights and position assured to them under the legal system and the constitution.

Remarkably the situation has changed and there is a phenomenal evolution of Indian women working and raising kids concomitantly, active in politics, reached space and have made the presence felt in every single area of public life. One of the source behind this evolution is the introduction of Indian Constitution which not only grants equality to women but also empowers the state to adopt positive measures in her favor for neutralizing the cumulative socio-economic, educational and political disadvantages faced by her.

Though our Judiciary have repeatedly suggested various measures to implement the provisions set under the Constitution and other legal documents to prevent discrimination but achieving absolute gender equality in a country like India continues to be a huge challenge.. Girls and women have been subjected to repulsive social practices as well as increased levels of violence as a result of this social construct. The majority of domestic and care work, which is both undervalued and unpaid, performed by women in a society like ours, which is predominately patriarchal in character, intrinsically engages misogyny, sexism, and promotes gender bias.

The social structure of a country can stimulate certain trends of change but at the same time it can also prove to be a challenge. In India we have diversity in culture, traditions, caste, religion that influence gender in the society. Women in India have not enjoyed uniform status from ancient to modern times. Let's take a glance at the position of Women Pre and Post- independence

In Ancient India – Women enjoyed equal status and rights during the Vedic period. Women participated in all spheres of life like men. Rig Veda suggest that woman were married at a mature age and they free to select their husband through swayamvara. Women enjoyed freedom of movement, access to reading Vedas and played an active role in the intellectual and social life of the country. Scriptures mention several great women sages and seers such as Gargi, Maitreyi and Indrani who were skilled in art, music and warfare. The concept of women as Sakti finds expression in the famous epic Mahabharata. However the privilege status that women enjoyed in the family and Society became Contradictory to the earlier Vedic Mahabharata and Ramayana days. She became an essentially weak and dependent creature

Medieval India- The Indian Women's position deteriorated during the medieval period when Sati, child marriages and ban on widow remarriages became part of social life among some communities in India. The Indian women's position in society deteriorated during the medieval period. Polygamy was widely practiced especially among Hindu Kshatriya rulers. Even Muslim conquest brought Pardah practice in our society. In many Muslim family women were restricted to Zenana areas only

Colonial era-. During colonial India the status of women seemed to be dependent on the treatment meted out to them by their men. Women were unaware of their basic rights as individual due to illiteracy, ignorance and economic subordination. The major social problems were Sati, condemnation of child marriage, female infanticide and polygamy. Women were denied access to education, social justice or equality. Due to these reasons, some crucial legislative enactments were made such as Sati Regulation Act 1829, Hindu Widow remarriage Act 1856, Abolition of Devdasi 1929.

Post independence- After India got its independence, Indian women could breathe freely after a long colonial rule once they learnt that the Indian Constitution has made special provisions for women's

advancement in different domains<sup>1</sup>. A fair deal was guaranteed to all equally without any discrimination on the basis of sex. The framers of the Constitution were conscious about the discrimination against women and hence made some provisions for upliftment of the status of women. Our laws, schemes and plans have been designed for women's development in various arenas.

The term gender equality in the **Constitution** is recognized in its Preamble, Fundamental rights, Fundamental Duties and Directive Principles of State Policy. The Preamble states „We the people of India“ is drawn to the people which is men and women in India regardless of their sex, caste or religion. It also provides equality of status and opportunity to all citizens which ensures equal rights of men and women in all spheres. Part III of the Constitution which is known as heart of the Constitution also provides certain human rights known as fundamental rights assuring equality and prohibiting discrimination against women.

Article 14- The said article talks about equal status or equality before the law. Every human being has equal right in the eyes of the law and hence even the State cannot refute it.

Article 15- This Article forbids discrimination on the grounds of religion, race, caste, sex and place of birth. But it gives power to the State for making distinctive provisions for women and children.

Article 16- Article 16 provides for equality in opportunity for all the citizens of this country in cases of employment to any government office.

Article 39- As per this Article, men and women are provided with equal rights for employment and equality in terms of equal pay to both

Article 42 – State to ensure humane conditions for work and for maternity relief

Article 51 (A) (e) – The Article speaks about each one's fundamental duty to relinquish the offensive practices against the dignity of women<sup>2</sup>.

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<sup>1</sup> Parveen Nuzhat Khan, Women and the law, Pg no 6 ( Lexis Nexis Publication, Noida, 1<sup>st</sup> Edition, 2016)

<sup>2</sup> Durga Das Basu ,Introduction to The Constitution of India, pg 91, (Lexis Nexis Publication Haryana, 26<sup>th</sup> edition, 2022)

Our Indian Judiciary being the ultimate guardian of fundamental rights has time and again applied and interpreted various fundamental rights to achieve gender equality. Through the judicial interpretations, several rights have been acknowledged though they had not been enumerated in Part III of the Constitution. Some of the such recent cases include:

**Shakti Vahini vs. Union of India**<sup>3</sup>, the apex court gave a landmark judgement that any attempt by Khap Panchayats or any other assembly to scuttle or preventing two consenting adults from marrying is absolutely 'illegal' and laid down preventive, remedial and punitive measures in this regard. It also gave directions to the State Governments and the Central Government to take preventive steps to combat honor crimes, recognizing the right to choose a life partner.

**Suchita Srivastava v. Chandigarh Administration**<sup>4</sup>, Supreme Court acknowledged that women's right to make a reproductive choice is also a dimension of "personal liberty" as understood under Article 21. It is important to recognize that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected.

**Joseph Shine v UOI**<sup>5</sup>, A five-judge Bench unanimously struck down Section 497 of the Indian Penal Code (IPC), thereby decriminalizing adultery, on the grounds that it violates Articles 14, 15 and 21 of the Constitution and that the said section is an archaic and paternalistic law, which infringes upon a woman's autonomy and dignity.

**Githa Hariharan v RBI**<sup>6</sup>, the Supreme Court held that the mother can act as a natural guardian even when the father is alive considering Gender equality as one of the basic principles of our Constitution.

**Indian Young Lawyers association v State of Kerala** (Sabarimala case): The Supreme Court has ruled that women, of all age groups, can enter Sabarimala temple in Kerala. The apex court in a 4:1 majority said that the temple practice violates the rights of Hindu women and that banning entry of women to shrine is gender discrimination. A five-judge Constitution bench, headed by Chief Justice of India Dipak

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<sup>3</sup> (2018)7 SCC 192

<sup>4</sup> (2009)9SCC 1

<sup>5</sup> AIR 2018 SC 2898

<sup>6</sup> (1999)2 SCC 228

Misra, said that the provision in the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965, which authorised the restriction violated the right of Hindu women to practice religion. The apex court observed that “what applies to a man applies to a woman” as well and that “once you open it for public, anyone can go”. The bench also said that a “woman’s right to pray was not dependent on any law but it is a Constitutional right”<sup>7</sup>.

**Mukesh v State (NCT of Delhi)**<sup>8</sup>: While dealing with the case of gang rape known as Nirbhaya case, the Supreme Court of India said that the Crime against women not only affects women’s self-esteem and dignity but also degrades the pace of societal development. The court expect an end to violence against women and recognised that every individual must fight for gender justice and public at large, especially men should be sensitized on gender justice. Justice Verma committee which was constituted to recommend amendments in criminal law recommended drastic amendments in legislations including laws relating to rape, sexual harassment, trafficking, child abuse, medical examination of victims, police, electoral and educational reforms.

Gender equality is not only a fundamental human right, but a necessary foundation for a peaceful and sustainable world. At the international level, India has ratified multiple International declarations and conventions including Universal Declaration of Human Rights(UDHR), International Convention on Civil and Political rights(ICCPR), International Convention on Economic Social and cultural rights(ICESCR) and most significantly Convention on Elimination of Discrimination against women(CEDAW). CEDAW also known as the Women’s Bill of Rights, recognizes that discrimination at all levels and obligates State to take all appropriate measures to eliminate discrimination against women and advance gender equality. The definition given under CEDAW does not only includes direct or intentional discrimination, but it speaks about every act that has the result of creating inequality between

men and women. It also holds state parties responsible for addressing bias and discriminatory acts perpetrated either by state or non-state actors.

CEDAW’s ratification by India is associated with progression in women’s rights and this can be

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<sup>7</sup> Sabrimala case available on <https://indianexpress.com/article/what-is/what-is-the-sabarimala-case-5376596>(accessed on March 23<sup>rd</sup> 2023)

<sup>8</sup> (2017)6SCC1

perceived in a few select cases in India. One of such cases being Vishakha v State of Rajasthan<sup>9</sup>, which guaranteed protection against sexual harassment in the workplace, determines that our courts can depend on CEDAW to reinforce the rights provided under the national legislation upholding women's rights. Another case being the Masilmani Mudaliar case<sup>10</sup> pertaining to property rights showing that CEDAW can put forth certain amount of authority and work around existing laws.

While India has taken some measures on human development, its global standing on gender equality remains low. The World Economic Forum's Global Gender Gap Index benchmarks the evolution of gender-based gaps among four key dimensions (Economic Participation and Opportunity, Educational Attainment, Health and Survival, and Political Empowerment) and tracks progress towards closing these gaps over time. India's rank is 112th out of the 153 total countries covered in the gender-based gap Index in 2020 and slipped 28 places to rank 140th among 156 countries in the Report of 2021<sup>11</sup>, becoming the third-worst performer in South Asia. The report notes that the economic participation gender gap actually widened, the share of women in professional and technical roles declined and India ranks among the bottom five countries in the health and survival in sub-index statistics.

Apart from the Constitutional rights and the International documents, we have many laws which contribute towards counter discrimination against women and secure equality among men and women. These laws contribute to eliminate discriminatory and derogatory practices that thus achieve gender justice. Some of such significant laws are:

**Sexual Harassment of Women at Workplace Act 2013:** The Act has been introduced for the prevention and redressal of complaints of sexual harassment as sexual harassment is considered to be violative of fundamental rights of women guaranteed under art 14,15 and 21 of our Constitution. The Act provides employers obligation to take steps such as providing safe working environment, organizing workshops and awareness programmes on the issues of sexual harassment and setting up of Internal Complaints committee in the office or organization

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<sup>9</sup> (1997)6SCC241

<sup>10</sup> AIR 1996 SC 1697

<sup>11</sup> The World Economic Forum's Global Gender Gap Index available at [https://www3.weforum.org/docs/WEF\\_GGGR\\_2021.pdf](https://www3.weforum.org/docs/WEF_GGGR_2021.pdf) (accessed on December 15 2022)

**Criminal Law Amendment Act 2013:** On the recommendation of Justice Verma committee, the criminal laws were amended and new sections were inserted and the existing ones were amended. Offences such as Acid attack, voyeurism, stalking and sexual intercourse during separation have been introduced for the first time against the backdrop of Nirbhaya case (Mukesh v State NCT of Delhi)<sup>12</sup> and punishment for gang rape and causing death or vegetative state of a person in cases of rape were extended to life imprisonment.

**Protection of Women from Domestic Violence Act 2005:** The Act was introduced to prevent women who were ostracized by their own people in their own homes. It provides protection to wife or live-in partner from domestic violence at the hands of the relatives. The Act made domestic abuse punishable and its beneficiaries are women and children. Physical, sexual, emotional, verbal, psychological and emotional abuse are considered to be forms of domestic violence.

**Protection of Children from Sexual Offences Act 2012:** The Act has been enacted to protect children from offences of sexual assault, sexual harassment and pornography. According to UNICEF, India has more than 40% of child population.

**Pre-conception and Pre-natal Diagnostics Act 1994:** The Act permits use of pre-natal diagnostic techniques only for detecting chromosomal abnormalities, congenital anomalies or certain kind of diseases. The Act prohibits any tests by the Genetic Clinics or Laboratories from conducting any techniques or tests including ultrasonography for determination of sex of the foetus.

**Equal Remuneration Act 1976:** Art 39 of our Indian Constitution provides for equal pay for equal work for both men and women and therefore to enforce the said Directive principle, the Equal Remuneration Act 1976 was introduced. The Act mentions duty of the employer to give remuneration for work which consists of any skill, effort or responsibility without any discrimination between men and women. The Act provides for composition of Advisory Committee who would decide on the complaints regarding contravention of the Act or claims by employee arising out of non-payment of wages at equal rates to men and woman workers for the work of similar nature.

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<sup>12</sup> (2017)6SCC1

**Medical Termination of pregnancy Act 1971:** To risk involved in abortions of female child or abortion of unwanted child by the unqualified medical practitioners, the Medical Termination of Pregnancy Act, 1971 was passed. The act aims to include rape and assault cases, married women, girls younger than 18 years, women with special needs, and women with foetal malformations of the foetus among those eligible for abortion. The termination of pregnancy is allowed majorly till the 20th week of pregnancy or in the cases where there are chances that the unborn child will have poor mental health or some kind of disability or abnormality. Termination of pregnancy also comes under the sphere of „personal liberty“ under Article 21 of the Constitution of India as interpreted in the case of K S Puttuswamy v Union of India<sup>13</sup>

**Maternity Benefit Act 1961:** Art 42 of our Constitution speaks about for maternity relief to women. First maternity Protection conference was held in 1919 and a resolution was passed regarding maternity benefit, economic benefits and non-termination of service during such leave. Maternity benefit Act was introduced. The Act provides provisions to safeguard interest of pregnant women workers. The Act mentions about payment of wages during maternity leave, leave of absence for miscarriage, nursing breaks and prohibition of dismissal during maternity absence or pregnancy<sup>14</sup>. The Supreme court has time and again found bar on continuation of service on the ground of pregnancy as arbitrary and unreasonable<sup>15</sup>.

**Dowry Prohibition Act 1961:** To curb the evil of dowry, which was associated with dakshina during Hindu marriage to the bridegroom or vara which has now gained the characteristics of a market transaction, the Dowry Prohibition Act was introduced. It has become a curse to the Indian society. The penal statute made the act of giving and taking dowry a punishable offence. Even the demand for dowry attracts penalty. Dowry death is made punishable even under new section 304-B of IPC.

Gender equality needs to be achieved, fundamental rights must be respected, protected in both the public and the private domain. Though the drafters of Indian Constitution developed the mechanism to achieve equality among men and women and though we have an ocean of laws which guarantee

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<sup>13</sup> 2017(10)SCC1

<sup>14</sup> Mamta Rao :Law relating to Women and children Pg no 530 ( EBC Publication Lucknow ,4<sup>th</sup> Edition 2021),

<sup>15</sup> Air India v Nargesh Mirza (1981)4 SCC 335

protection against gender discrimination and equal status to men and women, this concept has largely remained evasive in India's history as a republic nation due to multiple reasons like poor implementation of laws, patriarchy system in our society, economic dismay and lack of educational opportunities.

The struggle for women's rights is a struggle for human welfare. Discrimination exists even today as it is deep rooted in our Indian tradition. Empowering women is one of the significant way to strengthen democracy and we can develop true democracy only when we provide men and women equal standing in the social, economic, and political spheres. To attain gender parity among men and women, women have always demonstrated herself at equal footing to men in every arena. So what we can do to reinforce gender equality?

We can emphasize on gender equality by implementing methods such as reinforcing women's financial independence by providing them employment services or entrepreneur skills, by combating gender violence, by making more stringent penalties to those responsible for such violence and speedy trial in courts. By accelerating the judicial process of providing justice to women or speedy justice in cases of infringement of laws is considered to be a fundamental right under Art 21 of the Constitution of India.

Enlightened women should fight for her rights as well should stand for the rights of other women as this can be one of the ways of empowering women. It is further vital to generate awareness amongst the weaker divisions of the society about their basic human rights and sex education especially in rural area and by imparting education to girls/women with the purpose of building enhanced future for themselves and their families. Education strengthens economies and reduces inequality.

Our homes, workplaces, and other aspects of our lives can play a significant role in fostering a gender-just society. Raising our children without discrimination coupled with affirmative action would lead to increased economic and political representation of women and also would be a significant step in the right direction.