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Women's Constitutional Rights - A privilege

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ABSTRACT

Introduction- In the words of Gloria Steinem "A gender-equal society would be one where the word 'gender' does not exist: where everyone can be themselves." The rights to women were given under the Indian constitution seventy years ago; still we find that women continue to remain a suppressed class. The point to be highlighted is that it took us 70 years to realize that women can hold commanding positions in the armed forces. The basic rights of women are violated by the patriarchal structure of the society and the cultural norms that are set up. Here in this paper we shall be discussing about the provisions for women under the Indian Constitution as well as in Indian Law and discuss as to what extent it has been implemented and accepted by the society. While discussing so the emphasis will also be laid upon the sociological aspect as to why women are not being treated as 'equal'.

Theme- The paper shall be based upon the concept of equal rights to women with proper implementation and acceptance.

Objective- The objective of this paper is to describe what exactly the term "equal rights" and "equality" signify and also to present the provisions that are already present in our constitution but are not being implemented. It is also to bring out the problems that women face even though they have the rightful claim to it yet they are being deprived of it and being treated as equal still remains a privilege for the women even today.

Research Methodology- The paper is mainly based on the information gathered through articles, newspapers, books and internet sources as well as examples seen and observed by the authors.

Keywords- Constitutional Equality, Solidarity, Legitimate, Acts, Women and religion, women and occupation, women and employment opportunity, women and wages, women and life of dignity.

I. INTRODUCTION

The Indian constitution came into existence in the year 1950 which is around 70 years ago from today. The length of the constitution, the democratic nature of the Constituent assembly

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and the long time it took to be shaped are often discussed but the gender disparity of the constituent assembly is rarely part of any discourse. Out of 389 members in the committee, only 15 were women. This was perhaps the foundation of misrepresentation and inequality which the women of the country were going to face.

However the constitution favours the rights of the women but a woman has to face injustices in her life. Women are subjected to violence, abuse, female foeticide, sexual harassment, rape, prostitution and acid attacks which are prevalent even in the contemporary society. The preamble to the constitution provides with “equality of status and opportunity” to all its citizens in order to treat men and women alike. However only a handful of women have the right to being treated as equal for the rest of them it is just a privilege that they are still struggling to attain.

Under the Indian constitution the rights of the women are basically divided into two types the first is the constitutional rights which the constitution itself has provided and the second kind of right is the legal right which has been provided by the state legislature. The constitution makers did their part by adding a lot many constructive articles in order to improve the status of women. Few of these Constitutional rights are as follows:

Article 15 (1)³ says that the state shall not discriminate on the grounds of sex but how far it is true is a reality we all are facing. Women are treated as a second class citizen even in 21st century where the world speaks about modernization but the women are still fighting the same old battle. Had this article been well implemented or well respected there would have never been the question that are women allowed to enter the sancta sanctorum of the mosque or temple.

Article 16⁴ says that there must be equal employment opportunity to every citizen of India however this isn't something that is being practiced. Women are subjected to discrimination even at workplace and there are certain demarcations that have been made for what women can or cannot do.

Article 39(c)⁵ ensures that there must be an Equal pay for equal work but workplace still continues to remain a prime venue for discrimination.

Article 42⁶ provides for the secure and humane condition of work and for maternity leave. Yet, women are exploited both physically and emotionally by their bosses and peers.

³ INDIA CONST. art 15, cl. 2.

⁴ INDIA CONST. art 16.

⁵ INDIA CONST. art 39, cl. c.

⁶ INDIA CONST. art 42.

Article 51 A (e)⁷ is the most ironical article when seen in respect to the contemporary time. The article states to renounce practices derogatory of women. Yet we see numerous gang rapes, molestation and dowry deaths.

In order to uphold the Constitutional mandate, the state has also tried to enact many legislations considering equality and to counter social discrimination. The most prominent laws are: Dowry Prohibition Act, 1967, Protection of women from domestic violence act, 2005, The maternity benefit act, 1961, Equal Remuneration Act, 1976.

II. WOMEN AND RELIGION

It is the 70th year of our constitution and yet we see the tussle between gender and religion. For centuries the so called traditions have tried to keep women out of temples. Article 15 provided women with a right of not being discriminated and society took the help of gods to discriminate women. But the fight against patriarchy and man-made traditions had begun a long time back and the women now have a few successful stories to cite be it the Haji Ali Dargah case or the very recent Sabrimala Case⁸. In the words of Kofi Anan “there is no tool for development more effective than the empowerment of women.” It was in the year 2016 that a valiant lady named Dr Noorjehan Safia Niaz filed a PIL against the Haji Ali Dargah⁹ board which didn’t allow the entry of women into the mosque. She along with people from the women commission and minority commission took the matter to the court and fought the battle stating that gone are the days when the agents of gods used to set rules about the ways of worshipping. This bold step by the petitioner challenged the concept of gender segregation that is being practice since time immemorial and needs to be banished now.

The battle against patriarchy didn’t end here. Women are being discriminated in one form or another since the inception of religion and it has been described that women face three stages of discrimination in three different phases of their life. First, during the birth and then throughout the childhood. Second, during the menstruating and procreation phase and thirdly, during the last phase of her life¹⁰. In the case of Indian Young Lawyers Association.¹¹ famously known as the Sabrimala temple case, the second phase of struggle of women’s life is depicted where the age long custom of not letting women of menstruating age enter the sanctum sanctorum of the shrine was challenged. This temple is dedicated to lord Ayappa who depicts hyper masculinity and was a celibate. Menstruation has always been considered

⁷ INDIA CONST. art 51, cl. a.

⁸ Indian Young Lawyers Association v. The state of Kerela ,(2018) S.C.C. 1690 (India).

⁹ Dr. Noorjehan Safia Niaz v. Haji Ali Dargah Trust (2014) (India).

¹⁰ MANU/SC/1094/2018.

¹¹ Indian Young Lawyers Association v. The state of Kerela ,(2018) SCC 1690 (India).

as something impure In almost every society, women were discriminated on this physiological factor.

Every religion has discriminated women on this ground Quran says go apart from women during the monthly course, do not approach them until they are clean”¹²

Bible says “...in her menstrual impurity; she is unclean... whoever touches...shall be unclean and shall wash his clothes and bathe in water and be unclean until evening”¹³

In Hinduism Garuda Purana “A Brahmana having touched a dog, a Sudra, or any other beast, or a woman in her menses, before washing his face after a meal, shall regain his purity by fasting for a day, and by taking Panchgavyam.”¹⁴

The question still remains the same that what should be given more importance the religious practices that discriminate or the constitutional provision that provides equality. The decision completely rests upon us and even the highest court of appeal the Supreme Court stood in the favour of equality and allowed women to enter into the temple breaking the age old discriminatory custom. However this has happened only after 70 years of independence which is a quite long wait.

III. WOMEN AND OCCUPATION

Society has been discriminated on various factors socio-economic status, ethnicity, religion, culture and gender. Gender inequality takes place when men are considered to be a superior or a dominant gender over females, transgender and gender non conforming people. This inequality has always been present in the society and there have been different sociological perspectives that stand in support of gender inequality and claims that it serves a specific purpose.

The functionalist perspective believes that society is a complex system and each part has a specific function to perform. Talcott Parson developed the theory of gender inequality in his study on nuclear family where he assigned roles to both men and women. This division of work on the basis of “gender” was named as division of labour where women were to look into the house hold chores and men provided for the family. According to him the roles were predefined and this clear division brings stability and smooth functioning of the society. However this view should be highly criticised because instead of bringing solidarity it brings clear division within the family structure itself.

¹² Quran 2:222.

¹³ Leviticus 15.

¹⁴ Garuda Purana (ch. 231).

The conflict perspective goes a step further and labels women as a subordinate group and says that men are in the dominant position as in most of the ancient cultures men have had the most amount of wealth and have had huge estates. In a patriarchal society male's perspective and opinions is considered as more valuable to a female's view and thus has resulted to the marginalization of women.

However our constitution makers had a more radical approach to this and they believed in the concept of equality and inserted articles like Article 16 and Article 39 which provides for equal opportunity at workplace with equal pay for equal work. This may sound as perfect but it isn't because although the constitution provided the provisions but its implementation was still left in our hands, in the hands of we the people. And we the people choose to discriminate. This principle of equal pay for equal work is not expressly declared by our constitution to be a fundamental right rather it is a constitutional goal.

In the year 1967 an ordinance was brought by the labour minister which later turned out to be the equal remuneration act¹⁵ but the act turned out to be insufficient and inactive. In the act the word similar work has been heavily debated because it is a difficult to establish what work is similar or same. For instance if a man carries 50 heaps of cement and a women carries 50 bricks then how can similarity be proved is a big question. This is the reality that millions of daily wage workers are facing. According to a survey done in 2019¹⁶, the wage gap between men and women is 19%. The problem starts at the basic level as the base salary of women is way lower to a base salary of the male counterpart. And this has been accepted by a number of women as reported in the Times of India¹⁷ Hence, the bigger challenge lies in the fact to bridge the occupation and opportunity gap that exists.

IV. WOMEN AND EMPLOYMENT OPPORTUNITY

We are all aware of the fact that our constitution grants equality to everyone. Our preamble has also enumerated this in itself and though it's not enforceable¹⁸ by any court it still does possess a persuasive value. Economic equality is one of the essentials for ensuring overall equality. Economic equality is closely linked to social equality and social justice.

Various constitutional provisions have guaranteed economic equality in the form of equal remuneration and equal job opportunities to ensure that they have equal status in the society. Let's look at a few provisions in this regard. The basic stand of equality has been in Article

¹⁵ Equal Remuneration Act, 1976, No. 25, Acts of Parliament, 1976 (India).

¹⁶ Monster salary index, 2019.

¹⁷ "What is Nirbhaya case" *Times of India*, Dec. 1, 2019.

¹⁸ Berubari case.

16(1) which states that there must be equal opportunities of employment for every citizen. Article 16(2) further states that no person shall be discriminated on the basis of sex, caste, religion etc while seeking employment opportunities. However, the question remains before us that have, we been compliant to the provisions in the above article. According to World Bank report of 2018, the labor force participation among females in India has been falling rapidly. It stood at 26.97% in the year 2018 while the world average was 48.47%. This means that we stand almost on half of the parameters. We aspire to become a super power and yet such statistics don't show me how it can be achieved. Furthermore, according to the report of world economic forum in 2018, women earn only 65% of what their male colleagues earn. The pipeline of opportunities which is already small for women further shrinks when it reaches the top with the fact that out of India's 158 large companies, only 15% of board seats are held by women. Only 6% women head these as board chairs. According to UK based Equal Measures 2030, in 2019 India ranked 95th in 129 countries in terms of gender equality. Let's look at employment status of women in India.

I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin, but by the content of their character. - Martin Luther King, Jr. Well we all have heard the famous 'I have a dream' of Martin Luther King Jr. It talks about racial discrimination. But I would like to enumerate it here as well. Why can't we evaluate women on the basis the qualities they have, their talents and merits and not on the fact that they are female so they are inefficient to do work.

During the Vedic Age, which is often called as the Golden age of women, here were many scholars who composed hymns of Rig Veda. Lopamudra, Gargi and Maitreye were the pioneers among them. Lopamudra, the wife of Agasti rishi, composed two verses of Rig Veda. They shared equal status with women and however, it does not seem to be the same scenario today.

According to the Periodic Labour Force Survey 2017-18, by Ministry of Statistics and Implementation women unemployment rate in villages is 3.8% and that in our cities is 10.8%. So, our so-called forward thinking and fast-moving cities show a different face in this survey.

As per our constitution, we have various provisions which promote the employment of women. Articles 16, 32 and 51 are all advocates of women employment. However, these articles seem to be just an intricate set of words because the reality is quite different. Furthermore, we have specialized acts like Equal Remuneration Act, 1976 and Maternity

Benefits Act, 1961¹⁹ which have various provisions imbibed in them to protect the women at work places. For example- Section 5 of Equal Remuneration Act, 1961 states that no employer shall discriminate while giving and during this job. But this has not been the truly implemented. According to a World Bank report, 1/3rd of the job employment advertisements in India specify in them that they want males for the job. According to the same report, because of their sexuality women are preferred for the jobs of receptionist, beautician and teaching jobs. But the IT and engineering related jobs have been male dominated.

The factories act was enacted in 1948. It had a provision 66(1) (b) which prohibited women to work in night shifts. However, in 2001 it was declared unconstitutional by the supreme court of India in the case of *Vasantha R v Union of India*²⁰. I am highly appreciative of the structuralist approach of the courts. This said provision was violative of article 14, 15 and 16. The structuralist approach of courts helped women in working in night shifts too. We need to seek the same approach with regards to the equality of women in the society. Our focus has to be on the fact that it should be the power elites like the owner of the factory and other officials to provide secure work conditions for women who are at night shifts and not the fact that women can't work in night shifts.

Another case where recently, the courts took the structuralist approach was taken by the court in the case of the secretary, Ministry of Defence v. Babita Puniya²¹ in which first the Delhi High Court in 2010 and now recently the Supreme court of India has allowed permanent commissions and command positions for women in Indian armed forces. The top court said even after 70 years of post-colonial era, there is a need for change in mindset with regard to giving equal opportunity to women officers in the Indian Army. Even though we have come so far, we have to move forward. We have to open our minds and start thinking in order to make a society that is gender friendly and gender equal.

V. WOMEN AND WAGES

In the case of *State of Punjab v Jagjit Singh*²² the bench comprising of Justice J S Keher and S A Bobde (Now CJI), held that,- "f 'equal pay for equal work' has to be made applicable to those engaged as daily wagers, casual and contractual employees who perform the same duties as the regulars. Terming the denial of equal pay for equal work as "exploitative enslavement", "oppressive, suppressive" and "coercive", the apex court said that in a welfare

¹⁹ Maternity Benefits Act, 1961, No. 53 of Acts of Parliament, (1961).

²⁰ *Vasantha R v. Union Of India*, (2001) ILLJ 843 Mad (India).

²¹ *Ministry Of Defence v. Babita Puniya* (2020) (India).

²² *State Of Punjab v. Jagjit Singh* (2016) S.C.C. OnLine SC 1200 (India).

state, the principle has to be extended to temporary employees as well. In our considered view, it is fallacious to determine artificial parameters to deny fruits of Labor. An employee engaged for the same work cannot be paid less than another, who performs the same duties and responsibilities. Certainly no, in a welfare state. Such an action besides being demeaning, strikes at the very foundation of human dignity.”

According to the Monster Salary Index (MSI) published in March 2019, women in the country earn 19% less than men. The survey revealed that the median gross hourly salary for men in India in 2018 was ₹242.49, while ₹196.3 for women, meaning men earned ₹46.19 more than women.

Grade A contract for Indian women’s cricket team is Rs.50 lakhs while for men the same grade is 7 Crore rupees. How do we justify this in the year 2020? The justifications given to us that lack of funds and sponsorships is a poor explanation of facts.

Let’s take a look at the legal provisions of the laws in India to protect the status and working of women in India. A few provisions are-

Workmen’s Compensation Act, 1923²³: Aimed at providing financial protection to the workmen & his / her dependants in case of accidental injury by means of payment of compensation by a certain class of employers. Due to the difference in bargaining power there are chances that the woman may be subject to exploitation. This act helps to avoid that risk.

Minimum Wages Act, 1948: To provide for a statutory fixation of minimum wages, since workers are poorly organized & have a less bargaining power in India. There are no different wages paid for women workers.

Factories Act, 1948²⁴: Introduced to regulate the condition of labourers employed in the factories.

Contract Labour (Regulation and Abolition) Act, 1970²⁵: Provides for the separate provision for utilities and fixed working hours for women.

Equal Remuneration Act of 1976 -Provides for equal pay to men & women for equal work. Act was enacted keeping in mind the unequal physical & sociological burden a woman faces at the time of child bearing & rearing.

Time and again the question of gender pay gap has come to Indian courts. This came first in

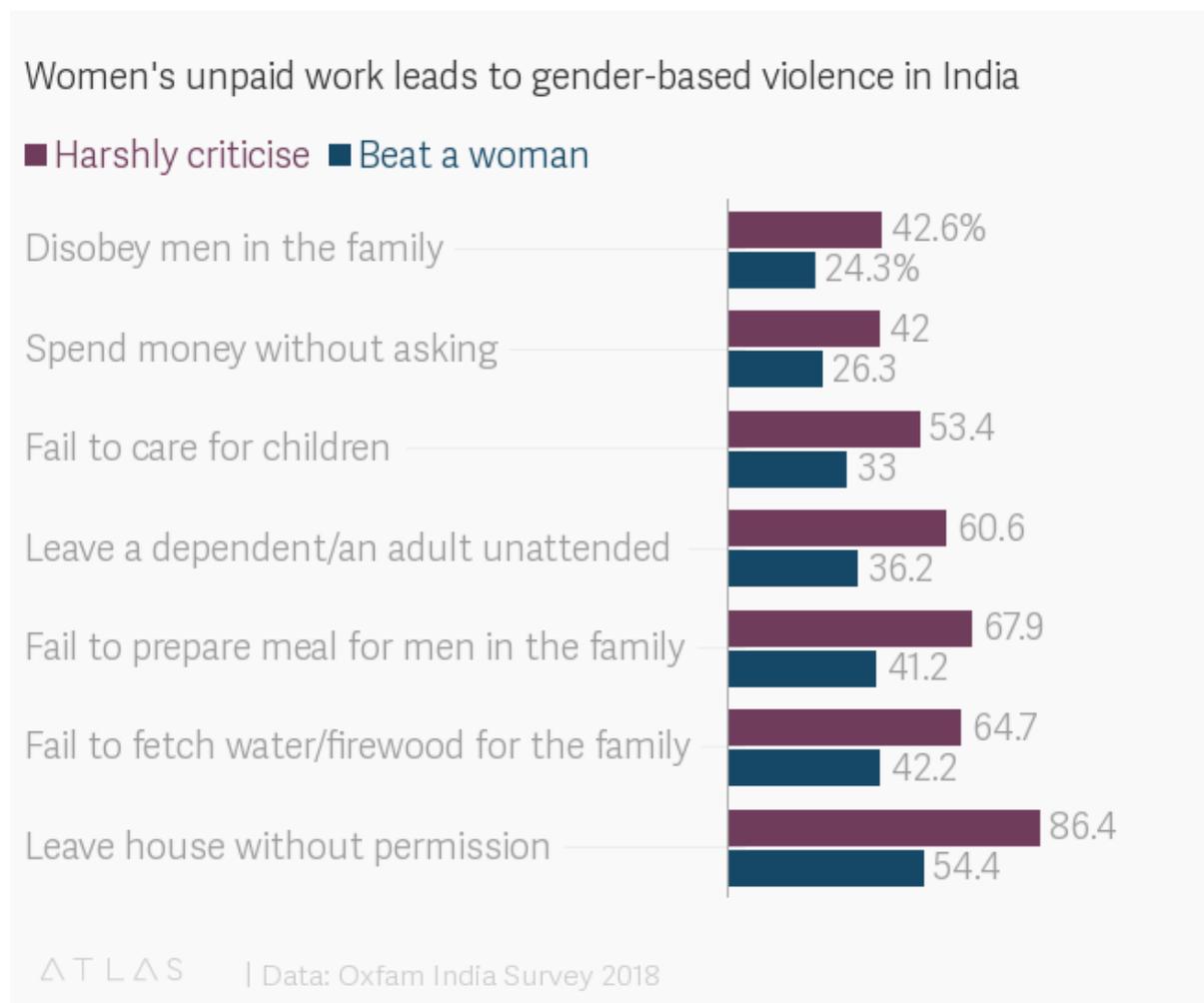
²³ Workmen’s Compensation Act, 1923, No. 8 of Acts of Parliament, (1923).

²⁴ The Factories Act, 1948, No. 63 of Acts of Parliament, (1948).

²⁵ The Contract Labour (Regulation and Abolition) Act, 1970, No. 37 of Acts of Parliament, (1970).

the court in the case of *Kishori Mohanlal Bakshi v. Union of India*²⁶. However, the court held that this principle is not enforceable in court of law. But finally, this was changed in the case of *Mackinnon Mackenzie vs. Audrey D'Costa*²⁷. In this case a claim for equal remuneration for Lady Stenographers and Male Stenographers. This was ruled in favor of lady stenographers as the Court was in favor of equal pay.

Here is a data which was published by Oxfam²⁸ in the year 2019 that shows how a women's unpaid work leads to gender violence.



VI. WOMEN AND A LIFE OF DIGNITY

It is ironic that crime rates against women are higher in a nation where nearly 80% of the population worships goddesses. Women in India once lived a life of dignity where they enjoyed all the rights, they had opportunities, crimes were unknown to them and equality was all around. This was the golden age for women, this was ancient India. But, things couldn't

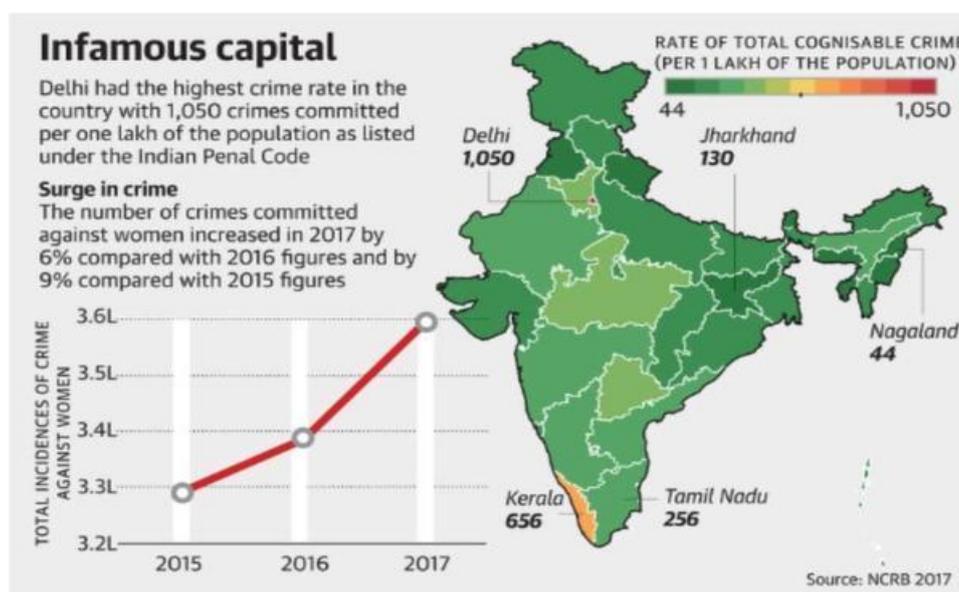
²⁶*Kishori Mohanlal Bakshi v. Union of India* (1962) AIR (SC) 1139 (India).

²⁷*Mackinnon Mackenzie and Co. Ltd. v. Audrey D'Costa* (1987) AIR 1281.

²⁸Oxfam India Survey, 2018.

remain the same for long and the status of women started declining and now women have to face all sorts of discrimination from inequality in jobs to being raped, molested and harassed. According to the recent statistics released by Nation Crime Records Bureau in the 'Crime in India' report where 3.59 lakh cases were registered for crimes against women which means that in every one and a half minute a crime was committed against the women of our very own nation and yet, neither the constitution nor the police could save the women. The data shows that 23.9% of all the crimes were committed with the intention to outrage the modesty of women. Uttar Pradesh topped this chart and continued to remain the place with highest crimes against women.

In the infamous capital of India on a cold and windy night of December 2012 when India's daughter was on her way to home that few barbaric men brutally gang raped her for about an hour and then left her on the streets to die. In her statement to police all that she wanted was justice but the justice has not yet been served. According to the 2017 National Crime Records Bureau, Delhi had the highest crime rate committed in the country with 1050 crimes committed per one lakh of the population.



VII. CONCLUSION

Thus, the question arises – even when all the organs of the government continue to perform their duties with regards to achieving the idea of gender equality, why is India then not witnessing these changes on the ground level? The answer is, India as a society fails to internalize these profound ideas. Even as the legislature makes progressive laws, the executive implements them and the judiciary does its part by upholding such pieces of legislation, we the people refuse to detach ourselves from the traditional, toxic and self-

harming ideas of masculinity and seeing women as the weaker sex. Thus, to bring structural changes in the Indian society, we the people must first accept the reality, and give women the opportunities and show them the path to grow, all of which they truly deserve.
