

# The Dimension of Special Provision for Women Under Article 15(3) of the Constitution of India; Furthering, the Feminist Cause, or Not At All?

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## ABSTRACT

This article aims to demonstrate the insights and also the blind analysis of gendered formulations of law along with the explanation for the use of gender essentialism to make an effort to transpire the ideology with the transfiguration of the societal norms and balance it all with the legacy of our forefathers to be carried forward. The conflict lies in the misinterpretation of terms like: Equality versus Difference, Cultural Feminism versus Structural Feminism, and Essentials versus Constructions. The author by way of this article tries to analyze the progressive element of our Nation and how the tradition has been long lost and forgotten and further makes an effort to suggest certain measures as to recover the essence of India as a nation where lies Unity in Diversity wherein all are treated equal and the nation which further holds the spirit of the Preamble of our Constitution in true sense.

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## 1. Introduction

*The social and cultural attitudes around woman is the barrier that is easiest to identify and the most difficult to remove. Gendered justice is the reproduction of these biases in the Process of law.*

A country is much beyond than just being a mere geographical location, its civilized countrymen is its mark. The transfiguration of countrymen socially, economically, politically, educationally and spiritually is the key to better understand that we are all fundamentally undifferentiated. The most common connotation is whenever, one has to ascertain as to how much developed or modern a particular society or nation is he should try to look at the status of women in that particular society or nation as their status is the only true reflection of a country's culture and civilization and the status of women in the society is determined by patriarchy, caste religion, economic status, media and the state policies.

Indian history and mythology have given place of pride to women. Sita, Savitri, & Draupadi are the women whose names strike the mind immediately. We are also familiar with a record of Maithreyi and Gardi, the Vedic Scholars, who mastered the Vedas and Upanishads facing much opposition. Manu, the great law-giver, said long ago. 'Where women are honored there resides the gods' and in the modern society of present time to address the issue of gender discrimination most prevalent in the society the need is to bring sociological empowerment primarily as foremost step to empower in totality.

India at present caught on the horns of a dilemma. It cannot serve its ties with the socially irrelevant tradition though that tradition has been rejected by society and merely ritualized.

Roscoe Pound, perceived law as an instrument of social engineering. Underlying this vision is the assumption that social processes are susceptible to conscious human control and the instrument by which this control is to be achieved is

law. In such a formulation, law is a short-term form of a very complex aggregation of principles, norms, ideals, rules practices and agencies of legislation, administration, adjudication and enforcement backed up by political power and legitimacy.<sup>1</sup>

India has a unique distinction of using affirmative action for undoing social and economic inequality. Equality is sought to be established through discrimination in favour of the victims of inequality.

Dr. Ambedkar in the course of his address given in Constituent Assembly accented on the fact that social democracy works beyond political democracy and further clarified that liberty cannot be divorced in any manner from equality and fraternity. Equality without liberty would kill individual initiative. Without fraternity, liberty and equality could not become a natural course of things and also admitted the absence of complete equality in our society.<sup>2</sup>

## 2. The Linguistic Foundation

'We the people of India', made a tryst with destiny to redeem every human being in our Republic from poverty, slavery, inequality, and deprivation of developmental opportunity and denial of access to justice in its well-known true dimensions.

India started with a grand Preamble and the glorious verbiage of Article 38 of the constitution, setting the nation's sights on socialist and secular, egalitarian and economically advanced goals.

A specific application of equality under Article 14 of the Constitution of India is provided under Article 15, which thus concretizes and enlarges the scope of Article 14.

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<sup>1</sup>Sally Falk Moore, Law as a Process, (London: Routledge and Kegan Paul, 1993)

<sup>2</sup>Constituent Assembly Debates, Vol. 11 4 on 26<sup>th</sup> November 1949, p. 977-978

The provision as provided under Article 15 of the Constitution of India reads thus;

**15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.-**

(1) *The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.*

(2) *No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to-*

(a) *access to shops, public restaurants, hotels and palaces of public entertainment; or*

(b) *the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.*

(3) *Nothing in this article shall prevent the State from making any special provision for women and children.*

(4) *Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.*

The expression under sub-article 1 to Article 15 "discriminate against" means to make an adverse distinction with regard to; to distinguish unfavorably from others.<sup>3</sup>

The use of word 'only' in the provision of sub-article 2 to Article 15 is of significance and it means, if there is any other ground or consideration for the differential treatment besides those explicitly prohibited under this article then such discrimination would not be unconstitutional.

The provision of Article 15(3) is based upon the principle of 'protective discrimination' whose object is to achieve precautionary, preventive and protective measure in favour of weaker section of society.

Thus, Article 14 guarantees the general right of equality and Article 15 is an instance of same right in favour of citizens in some special circumstances.<sup>4</sup>

### 3. Equality Versus Difference

'Women will not be free from violence until there is equality; and equality cannot be achieved until the violence and threat of violence is eliminated from women's lives'<sup>5</sup>

Demand for empowering is not a demand for equality or superiority, it is the demand to let them realize their "own true self" which shouldn't be denied to them on any basis whatsoever; anywhere, anytime and anyplace.

Rights when found to be in confrontation with the issues based on ethical grounds it has been most commonly observed that men under such circumstances think in terms of rights while women under such circumstance think in terms of

<sup>3</sup>KathiRaningRawat v State of Sourashtra, AIR 1952 SC 123.

<sup>4</sup>Dasaratha Rama Rao v Sate of A.P. AIR 1961 SC 564.

<sup>5</sup>Canadian Panel On Violence Against Women, 1993 Changing The Landscape: Ending Violence-Achieving Equality, Ottawa: Minister of Supply and Services.

responsibilities they share to others. Over the years of first half of 20th century, the struggle continued and women coined the phrase "Bread & Roses" after James Oppenham's poem of the same name. The reference to "Bread" is freedom from hunger, and "Rose" is the satisfaction of the wants or wishes.

On one hand women are adored in exalting terms in folklore and literature but on another that is in actual practice women are suppressed, discriminated and exploited with impunity.

Equality between citizens is a norm of western democratic liberal society, but many citizens do not belong to the society of equals.

As we have seen that inequalities arise from discrimination based on unequal power relations between women and men, hence assessment of progress towards gender needs to establish quality whether changes that are being achieved are significantly altering these relations. Thus, whether women and men are being treated equally will depend on whether the fundamental freedoms and choices they confront are the same.

Generally when we refer to the term 'equality' the terms which qualify the concept of 'equality' are; the 'Equality before law' and the 'Equal protection of laws' but it is to be noted that the meaning is not to be construed always so as to implement identically the same laws to all persons and thereby having an universal application within the country without considering the facts as to the differences that lies in the circumstances.

Further, there arises the concept of difference within the ambit of equality i.e when circumstances get considered in every classification there is likelihood of producing inequality and all kinds of differential treatment does not per se constitute violation of Article 14 of the Constitution of India which enshrines the concept of Equality.

### 4. Cultural Feminism Versus Structural Feminism

C. Wright Mill's classical notion of 'Sociological imagination' stresses the importance of looking beyond people at the individual level to the structural backdrops of all personal lives. He argues that the individual level to the structural of all personal lives. He argues that the individual can understand his own experience and gauge his own fate only by locating himself within his period that he can know his own changes in life only by becoming aware of those of all individuals in his circumstances.

According to Peter Berger, to be located in society means to be at the intersection point of specific social forces. Location becomes important because it influences a whole gamut of conditions ranging from life-chances and health to worldwide.

Gender identity is no less a construction of patriarchal culture than the idea that men are somehow superior to women; both are born at the same time and with same stroke of the pen. The psychology or identity that feminist essentialists think is different from men's is merely the product of conditioning under patriarchy, a conditioning to be caring,

relational, and maternal that may make women seem more ethical than men, but a conditioning nonetheless. The constructionists worried that the essentialists were taking an effect to be a cause, interpreting the subordination of women as women's nature. What must change, they contended, is not the way androcentric culture traps and stifles a woman's identity that should be liberated into separation, but rather the way all gender, both male and female, is fabricated.

Since, the beginning of 19<sup>th</sup> century there has been an issue with regards to demand and fulfillment of the same related to social reform in general and women emancipation in particular. On the social front the struggle was against the social evils such as sati, polygamy and emphasis on widow remarriages and women's education.<sup>6</sup> These efforts for removal of social evils were sought to be re-enforced by the instrumentalities of law such as sati prohibition Act, Widow Remarriages Act etc. The stalwarts of early reform movement emphasized on the social reform as a pre-condition for political reforms.<sup>7</sup> As a result the system of reforming social evils through or by way of an instrumentalities of state became a tradition and achieved a statutory recognition but the point, which was and in fact has been forgotten to be considered is that legal remedies for social evils can be functional and operative up to a point because beyond that limit it gets dependent upon the extent of acceptability of the value system in and by the society at large. What we have been trying to use is that political institutions, which are essentially the tools of governance along with the instrumentalities of state for the purpose of social transformation and then, guarantee Justice to all individuals with regards to all facets of life. But the system we aim at, at present is the one whose acceptability is not found to be deep and comprehensive and thus it fails to spread evenly amongst all the sections of our population.

Socio-economic-political-legal life assurance does not develop in vacuum. The structural combination of each one of the factors is highly complex and determined majorly by the history, traditions and culture. Their roots lie deep in the ethos and social behavior of a particular system.<sup>8</sup> When we aim to emulate the institutions of the system not known to the ethos and culture, tradition and convention then there has to be long indigenization process and some kind of acceptability developing on a larger scale and which for sure is not a case with India.

Further, when we burden the state system with the things it finds difficult to solve it results in dis-functionalism of various structures of the state system and often leads to frustration. It has been found in the chapters of Indian history whereby the politics wasn't allowed to look into the affairs of social evils and development such as Brahma Samaj, Prarthana Samaj, Arya Samaj, etc. which met its purpose to contribute successfully towards the development and eradication of social evils.

## 5. Essentials versus constructions

<sup>6</sup>PremArora, Comparative Politics and Indian Political System, (New Delhi: Cosmos Bookhive Pub, 1998)

<sup>7</sup>PremArora, Comparative Politics and Indian Political System, (New Delhi : Cosmos Bookhive Pub, 1998)

<sup>8</sup> ibid

The two perspectives whereby the constructionists accepted the fact that gender is made by culture in history and second one believing that the gender reflects a natural difference between men and women which is more biological followed by linguistic and psychological; essentialists

Law is manifestly a social phenomenon, characterized by internal plurality and inter-linkedness with other aspects of life. Its Justice-focused operation must reflect that Indians as citizens and individuals cannot escape the socio-economic realities of their daily lives as well as the pressures of a shrinking global world.

Theorists from time to time and from divergent angles have attempted to explain the differences between men and women and tried to find out the sources of women's subordination to men. Biological explanation given by Mill suggests that the reason for women's submission was the superior strength of the men in the earliest stage of society. Anthropologists like Henry Maine and J.J Bachofen hold that the patriarchal system of authority was the original and universal system of social organization. Marxist thinkers like Engels' established that with the use of private property the status of women declined, the women was 'degraded and reduced to servitude' and the female 'became the slave of his lust and a mere instrument for production of children'.

According to Butler, gender is an illusion maintained by prevalent power structures.

Some even rely on the observation made in the case of Muller v Oregon<sup>9</sup> that women's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence and her physical wellbeing becomes an object of public interest and care in order to preserve the strength and vigour of the race.

## 6. Suggestion and Conclusion

Feminism construed to play a very prominent role when it gets to Gender justice phenomenon. Any traditional custom that places women in subordinate positions within society or in the family has the potential to turn violent and it is important to broaden the concept of access to justice from legal justice to gender justice and for the same we have to go beyond its liberal

understanding to comprehend why judicial outcomes are gendered.

American sociologist, William M Evans<sup>10</sup> writing in the light of American experiences, shortlists some basic conditions, which may provide a framework of such a system of rules that may lead to social change. First source of new law must be authoritative and prestigious. Secondly the rationale of the new law must be expressed in terms of compatible and continuity with established cultural and legal principles. Law in fact can be powerful force for change, when the change derives from a principle deeply embedded in our heritage. Thirdly pragmatic models of compliance must be identified. The underlying idea of this condition is that law must not appear utopian but practical in its aims. Another important

<sup>9</sup> 2 L.Ed. 551

<sup>10</sup>As quoted by G.S.Sharma, in Law and Social Change, 1971, Indian Social Science Research, New Delhi.

condition that Evans talks of is the element of time in legislative action. But this condition appears to be rather unenlightening answer to a complex question. The appropriate timing and strategy depends on the extent and complexity of change that law seeks to bring about.

The sub-systems have recourse to such immoral, illegal, unjust methods and they are used with impunity against the members belonging to both genders indiscriminately. The judicial centre must be the justice of the situation, rather than the legal rule laid down by state law, legal positivism has had to concede primacy to ancient methods of law-making, working out justice on a situation-specific, case-by-case basis.

Making gender central can be accomplished through a combination of gender mainstreaming; women focused activities, or gender equality promotion activities. As countries seek to redevelop after conflict, the centrality of gender can be justified on an economic, social, psychological, or legal basis.

The old saying that 'power corrupts' recognizes the potential for some exercise of power to become pathological. Boulding holds it is not merely power which may be corrupting but also its influence and even powerlessness.<sup>11</sup> So, unequal distribution of power within the patriarchal structure can have harmful consequences for women.

Reaching women in remote rural areas and creating a legitimate organizational space where women can meet and function as a collective has been recognized as a development of significant potential for challenging the social and economic isolation of women.

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<sup>11</sup>Boulding, K.E., *Three Faces of Power*, Newbury Park, C.A: Sage, 1989