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SOCIETY FOR PUBLIC WELFARE AND INITIATIVES

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Contents

1. Welfare Strategies for the Old Aged Persons in India- *A Study* 1
----- *Dr. G. Rameshwaram*
2. Work Stress Among Women Employees in South Central Railway: 16
A Case Study
----- *Dr. A. Shankar Kumar*
3. Lambada Tribes in Telangana State: *An Ethnographical Profile* 27
----- *Dr. Gugulothu Ravi*
4. Status of Gotti Koya Tribes in Telangana State 40
----- *Dr. K. Bhaskar*
5. Feminism and the Constitution of India 45
----- *Dr. Mamatha Bollmpalli*
6. The Role of Women in Panchayati Raj Institutions: 56
A Comparative Study of Warangal Rural and Karimnagar Districts
----- *K. Anitha*
7. Yerukala Tribes in Warangal District of Telangana State - *A Study* 72
----- *Radhika Palakurthi*
8. Women Political Participation in Local Governance: 78
A Comparative Analysis
----- *Ch. Naresh Kumar*
9. Ethnographic Profile of Koya Tribes in Telangana State 89
----- *M.V. Kaleswara Rao*

10. Central Board for Workers Education Scheme- <i>A Study</i> ----- <i>Alsingh Ajumeera</i>	103
11. Influencing Factors of Voting Behaviour- <i>An Analysis</i> ----- <i>Mohan Reddy, M.</i>	107
12. Anti-Hindu Contents in Constitution of India- <i>An Analysis</i> ----- <i>Bhukya Ramesh</i>	115
13. Secularism and Indian Constitution ----- <i>Gundu Suresh</i>	121
14. Civic Services Administration- <i>A Study of Nizamabad</i> <i>Municipality, Telangana</i> ----- <i>B. Ramesh</i>	125



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FEMINISM AND THE CONSTITUTION OF INDIA



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Abstract: *The Constitution of India, also known as the cornerstone of a nation, lays down methods (through provisions) for social, economic and political revolution in India. It is the primary document that gives the definition and guarantee of equality, justice, liberty and democracy to the Indian citizens. The Preamble states that one of the basic provisions of the Constitution is to make sure there is social, economic and political justice for all its citizens. In this paper, the author intends to examine the provisions of gender justice in the Constitution and the role of law in securing justice for women. In doing so, the author shall also study, the feminist challenges to the interpretation of the provisions of the Constitution as well as to the legal discourse. This paper raises the point that conditioning towards habitual regressive societal ideas restricts the possibility of autonomous decisions. In conclusion, it is to be observed that laws need to bring about fair conditions of social behaviour and a liberty-inducing model from disabilities that have been socially imposed and encourage freedom of choice in decision making. This feminist intervention is linked with the concept of justice and equality that has been embedded in the constitutional framework. A study of the criminal and personal laws reveals that laws are affiliated with protectionist and paternalistic ideals to manifest empowerment and autonomy among women. This paper engages a discussion on issues at the core of gender justice.*

Keywords: *Feminism, Indian Constitution, Gender Equality*

Introduction

The feminist movement/women's movement/feminism refers to an array of campaigns of the political nature for change in social evils and demand for bodily reproductive rights (pro-choice), removal of *domestic violence in the society, maternity leave, equal pay, women's suffrage, sexual harassment, and sexual violence*, all of which fall

within the ambit of feminism and the feminist movement. Our constitution has provided in article 14 read with article 12 that state should not refuse to anyone equality for all in the eyes of the legal system and equal protection of the law across India and no discrimination on grounds of religion, race, caste, sex or place of birth. In consonance with this, article 15(3) also provides the provision where nothing shall prevent the State from making any special provision for women and children. Feminism in India is an arrangement of manoeuvres to provide definition, establishment, and defence of equality in political, economic, social rights of women in India. It is the pursuance of women's rights under Indian society. In comparison with feminist movements in other countries, feminists in India want and believe in gender equality: the right to equal pay for equal work, the right to get good quality health and education, and equal political rights (eg. the right to vote), etc. Indian feminists also have fought against issues that are specific to cultural mindsets within India's patriarchal society, eg. inheritance laws and dowry. To Indian feminists, these are high-priority injustices that are worth fighting for. In Western countries, there has been criticism of feminist movements in India, as it is mostly first-world/mainstream feminism. Indian feminism in popular culture and media platforms tend to focus on already privileged/cis-gender women, neglecting the needs and representation of poorer or lower-caste/Dalit/intersex/trans-women. Feminist organizations and movements have now been initiated especially for caste. Though the legal system helps to curb gender discrimination and injustice, some patriarchal notions guiding the interpretation of legal provisions have compelled a feminist rethinking of law as a tool for gender justice, eg., "Enraging the modesty of a woman" in the IPC. It challenges the dichotomy of man and woman and states that if men and women are fundamentally different as categories, then a single yardstick for measuring justice is wrong.

Feminism in India a Historical Perspective

The history of feminism in India can be traced into three stages: the first phase, beginning in the mid-19th century, started when reformists began to speak in favour of women rights by making reforms in education, customs involving women; the second phase, from 1915 to Indian independence, when Gandhi incorporated women's movements into the Quit India movement and independent women's organisations had begun an uprising; and finally, the third phase, post-independence, which has focused on fair treatment of women at home after marriage, in the workforce and right to political parity. Despite the Indian feminists gaining headway on certain issues, women living in modern India still face discriminatory behaviour, which shows we still have a long way to go. India's patriarchal culture has made the process of getting the right to property and access to education challenging for girls. Over 20 years, sex-selective abortion has become an emerging trend. This is because they believe the female child is a burden because of dowry to be paid when she attains a marriageable age, which shows that one social evil result in another in a vicious cycle. Feminists believe that history was written by men and for men, excluding women that have

made inventions or added structure to the society, which has created a hole of information in the concepts of human nature, gender potential, and social arrangements. The language, logic, and structure of the law are created by men and reinforce toxic masculinity. Male characteristics are considered normal, and female characteristics are shown as deviation from the norm, so these prevailing conceptions of law reinforce and perpetuate patriarchal power. Feminists oppose the belief that women are so different from men biologically, that it assigns generalized attributes to women as being too emotional. This shows feminism is also good for women as it enables men to be more vulnerable and move away from patriarchy. They believe gender is a social construct, and not determined biologically. Sex ascertains matters like physical appearance and reproductive capacity (based on science, eg. secondary sex characteristics), but not psychological, moral, or social traits.

Feminism in the Constitution of India

The Indian Constitution has adopted protective measures to protect women's interests through various provisions. Concerning the case of National Legal Services Authority v. Union of India, it was held that the concepts of justice, social, economic and political, equality of status and opportunity and of assuring the dignity of the individual incorporated in the Preamble, clearly recognize the right of one and all amongst the citizens of these essentials designed to flower the citizen's personality to its fullest. The Indian Constitution, which is the longest, most extensive constitution in the world, is gender-sensitive. It clearly states that the mindset of the constitution framers was based on the concept of equality and positioning women equal in every sphere, even decades ago, when the feminist movement in India was at a nascent stage.

Women Who Helped Draft the Indian Constitution

Out of 392 people that were appointed for the constitution drafting committee, only 15 were women, which makes the representation of women less than 4%. While this is not ideal, it is important to note the widespread illiteracy and subjugation, especially amongst women, and caused by pre-existing societal prejudices and norms, had made it almost impossible for women to claim a political space. There were 15 women from diverse backgrounds - through and unsurprisingly so, the number of Savarna (upper-caste) women was more than that of the Avarna women.

1. **Ammu Swaminathan** was elected from the Madras Constituency and was a firm advocate for the abolishment of the archaic and oppressive caste system and sided with Ambedkar for several caste-related issues. Being an upper-caste woman, Ammurecognized the evil of caste and even criticized Jawahar Lal Nehru for responding to Panditji which she saw a sign of superior class dominance.
2. **Anne Mascarene** was one of the first women to join the Travancore State Congress and became the first woman to be part of the Travancore State

Congress Working Committee. She was one of the leaders of the movement for independence and integration with the Indian nation in the Travancore State.

3. **Begum Aizaz Rasul** was the only Muslim woman among the fifteen and was elected from the U.P. in the Constituent Committee of India. She was elected to the Rajya Sabha in 1952.
4. **Dakshayani Velayudhan** had her roots in the Pulaya community in Cochin, Kerala and was among the first generation of women of her community to be both educated and wear an 'upper-cloth'. She was the first and only Dalit woman who was elected to the Constituent Assembly. She, along with Dr. Ambedkar, brought many caste-related issues to light in the Assembly debates. She also happened to be the youngest member of the committee at 34 years of age.
5. **Durgabai Deshmukh** was the only female member of the Panel of Chairmen in the Constituent Assembly. She played a significant role in the enactment of many social welfare laws. She was also the one who proposed Hindustani (Hindi+Urdu) as the national language of India.
6. **Hansa Jivraj Mehta**, elected from Bombay, was a member of the Fundamental Rights Sub-committee, the Advisory Committee, and the Provincial Constitutional Committee. A few minutes after midnight on Independence Day, Mehta, on behalf of the "women of India", presented the national flag to the assembly—the first flag to fly over independent India. She, along with Rajkumari Amrit Kaur, modelled the Indian Women's Charter of Rights and Duties and fought for the Uniform Civil Code (UCC). She recognized herself as a feminist and worked extensively in the women's movement that pushed for the abolition of child marriage (the Sarda Act), the Devadasi system, better educational opportunities for women, and personal law reforms.
7. **Kamla Chaudhary** had come from an affluent family in Lucknow but had struggled to get an education. She was one of the most active women in the Civil Disobedience Movement in 1930. The British government jailed her several times. In 1946, she was made the Vice President at the 54th conference of the Congress held in Meerut. She was a member of the Constituent Assembly from 1947 to 1952, and she was also a prolific writer and wrote extensively on gender discrimination, exploitation of peasants, and poor condition of widows in the society.
8. **Leela Roy** was a feminist who, time and again, had protested and fought for what was right. From a young age, she threw herself into social work and education for girls, supported vocational training and emphasized the need for girls to learn martial arts to defend themselves.
9. **Malati Choudhary** was a socialist whose struggle for what is morally correct didn't stop at obtaining freedom for the country, she went to jail for protesting against Indira Gandhi's imposed Emergency.

10. **Purnima Bannerjee** was perhaps one of the most strong-headed women elected from Allahabad (present-day Prayagraj), Uttar Pradesh and worked extensively towards rural engagement.
11. **Rajkumari Amrit Kaur** came from the princely state of Punjab and founded AIIMS (All India Institute of Medical Science) and argued for its autonomy. She firmly supported women's participation in sports, medicine, and health. She set up the Tuberculosis Association of India, the Central Leprosy and Research Institute, held the vice-chair of the Board of Governors of the League of Red Cross Societies, and also the Chair of the Executive Committee of St John's Ambulance Society.
12. **Renuka Ray** hailed from West Bengal and was a strong advocate for gender equality. Renuka argued for a UCC, stating how the position of Indian women was iniquitous.
13. **Sarojini Naidu** is possibly one of the most famous names from the drafting committee. She is popularly called the 'Nightingale of India'. She was the first Indian woman to be president of the Indian National Congress and to be appointed as Governor of a State. Besides her exemplary work in the field of women empowerment, she was known for her literary prowess and was elected as a member of the Royal Society of Literature.
14. **Sucheta Kriplani** came from the present-day Haryana and is celebrated for her pivotal role in the Quit India Movement in 1942. She was also responsible for establishing the Women Wing in the INC in 1940. She was the first woman Chief Minister of India when she took over the office from Chandra Bhanu Gupta (Uttar Pradesh) in 1963.
15. **Vijaylakshmi Pandit**, the sister of Jawahar Lal Nehru, was appointed as the first woman and became the first Asian to be elected President of the U.N. General Assembly in 1953.

Feminist Provisions of the Constitution

Fundamental Rights:

Talking about equality, our constitution has provided us with certain rights and provisions which protect the positivist/equalist atmosphere. One of the main provisions of equality is embodied in Article 14, which embodies equal treatment before the law. In this Article, 'equality before the law' is a negative concept that implies the absence of any special privilege in favour of any individual. It ensures that all are equal before the law and no person is above the law. It ensures that all persons are equally subject to the ordinary laws of the land. On the other hand, 'equal protection of laws is a positive concept, which suggests the need for affirmative action.

On inspection of Article 14, Article 15 and Article 12, it reflects the thinking of our constitution-makers to prevent women against gender discrimination. The

interpretation of Article 14 in the light of gender equality states that all persons including women are equal in the eyes of the law and they also have the entitlement to have the right of equal protection of laws within the territorial jurisdiction of India. Law and the nation should treat both the sexes equally in circumstances of similar type, whereas Article 15 whereas protects women from any kind of discrimination.

Article 15(3) gives the power to the state to make any special provision for women and children so that the concept of equal protection of law remains stable in the cases where the same treatment would have been received but was infringed.

The first approach is the 'exceptional' approach, which considers that Article 15(3) is an exception to the general guarantee of equality. Seen in this light, it is based on formal equality, which reads equality as sameness. Hence any difference in treatment is considered an exception to equality.

The second one called the 'holistic' approach considers Article 15 as a whole and hence Article 15(3) is used to interpret equality more broadly. According to this approach, any difference in treatment is not considered as an exception to equality. Rather it considers that equality sometimes requires different treatment. In this sense, it is based on the substantive model of equality.

Special treatment embedded in Article 15(3) is not seen as an exception but as a fundamental part of equality. According to the substantive approach to equality, we find that 'sex' is a category that denotes disadvantage, in the sense that the sex of a person has been used as a basis for discrimination and has resulted in women being disadvantaged as compared to men. However, sometimes the Court views all other social and economic factors that fortify disadvantage, as separate from 'sex', instead of seeing the fundamental relationship between them.

Nevertheless, Article 15(3) has been useful for legislating in favour of women. Many laws have been passed to prohibit female infanticide, dowry, exposure of women in films and advertisements, child marriage, molestation, abduction and rape, providing maternity benefits and protection in employment. Another article directed at bringing about equality among sexes is Article 16 that guarantees equality of opportunity to all citizens.

Article 16(1) assures that all citizens get access to equal distribution of opportunity in matters about employment/appointment to any State-owned office. Article 16(2) guarantees that no citizen shall, due to religion, race, caste, sex, descent, place of birth, residence, etc. be disqualified for/discriminated against in respect of any government job position.

An exception (special measures) to Article 16, Article 16(4) says that nothing in this article shall restrain the State from making any provision for the reservation of posts for any backward class/weaker sections/minorities which, according to the

prudence and rationale of the State, is not correctly represented in the services under the State.

Article 16, in conjunction with Article 14, has been used to guarantee equality of opportunity and non-discrimination based on sex in employment. Moreover, the marital status or pregnancy of a woman is used to discriminate against her in employment is also held as a violation of Articles 16 and 14.

Some High Courts have stated that Articles 14,15 and 16 constitute a single code. In a judgement, Justice Mathews has argued that formal equality is achieved when all people are treated equally, but states that men and women are not equal in all aspects. As a result, some sort of proportionate equality is required to achieve justice. Such proportionate equality can be achieved only when equals are treated equally and unequal are treated unequally.

Some other articles that are important to gender justice include Article 21, which states: "No person shall be deprived of his life or personal liberty except according to the procedure established by law". This Article guarantees protection of life and personal liberty and has often been employed for the protection of women. For example, this article has formed the basis for the provision of protective and humane treatment for inmates of women's remand homes. Here the 'right to life' implies more than mere existence, it implies the right to live with human dignity. At the core, rape is considered a crime against the basic human right of life with dignity, and hence in violation of article 21.

Similarly, Articles 23 and 24, which prohibit traffic in human beings and forced labour, and employment of any child below the age of fourteen respectively, can also be viewed as provisions that are positive and progressive towards women. These provisions have inspired many laws including those for the prevention of traffic in girls and women, and the Indecent Representation of Women (Prohibition) Act, 1986.

The disadvantages of the democratic process and risks of parliamentary majoritarianism make it imperative that a pro-woman and anti-subordination interpretation of the Constitution and laws shall be made and under the light of positive discrimination further this provision was created. In the following case of *Bodhisattwa Gautama v. Subhra Chakraborty*, the court talked about the need for laws that shall curb the practices of dominance analysis that is found in our patriarchal society. The court held that unfortunately, a woman, in our country, belongs to a class or group of society who are in a disadvantageous position on account of several social barriers and impediments and have, therefore, been the victim of tyranny at the hands of men it was held that certain laws help to soothe the position of women in the society. This indicates that they are very much constitutionally valid as they come under the legitimate title of positive discrimination which is fundamentally the rule of equal protection.

In the landmark case of *Nargesh Meerza vs. Air India*, it was finely pronounced that based on gender discrimination, a woman shall not be rejected employment. The Apex Court ruled that even however the first provision is sensible while the second and third provisions are unpleasant, illogical and unauthorized.

In the case of *C. Rajakumari vs Commissioner of Police, Hyderabad* the critical query was raised before the Andhra Pradesh High Court belong to the point of whether the beauty competitions which offensively shows a women's body, figure and form violate Article 15 of the Constitution. The court states that if in any beauty competition, the body is showed in a way of offence and is harmful to community ethics then such beauty competition would be considered as the violation of the provisions of the Offensive Demonstration of Females (Prohibition) Act, 1986 and also unauthorized as it interrupts Articles 14, 21 etc.

Directive Principles of State Policy:

Article 39A and Article 39D of the DPSP talks about having an equal right to men and women for an adequate means of livelihood whereas the latter supports equal pay for equal work for both men and women. The framers had a long-sighted vision which allowed them to think of the problems, a woman would have faced in the changing trends of society. To support the fact, article 51A further talks about the provision which renounces practices derogatory to the dignity of women. However, seeing the laws cumulatively, there is no going back to the thought that the constitution has forgotten the position of women.

Protectionist Interpretation of Laws for Women

Despite the broad horizon provided by the Constitution, the interpretations of these provisions have echoed the patriarchal and conservative nature of Indian society. Women are subjected as subordinate to men when they are put under the status of the weaker sex. The constitution gave the tag of weaker sex keeping in mind the past discrimination that a woman has gone through. The economic and sociological prejudices in their past have made their progress rate slow and further, they need laws for the advancement. The Constitution nowhere mentions that women are weak in comparison to men according to nature. Such patriarchal interpretations are prevalent for a long time.

Taking an example of the law of Adultery which is now unconstitutional, earlier in the case of *W. Kalyani vs. State Tr. Insp. Of Police & Anr.*, it was held that only men can be prosecuted for the offence of adultery and women cannot be prosecuted. The judgment was further criticized on the grounds for showing a strong gender bias making the position of a married woman almost as a property of her husband. The women were seen as it was subordinate to men and in their jurisdiction. It took almost 160 years for the court to understand that women are not chattel and have certainly

equal status that of men. After having the provisions of equality in article 14, the court continued to interpret the law basely. I

n the recent judgment of section 497, the court held that there cannot be a patriarchal monarchy over the daughter or, for that matter, a husband's monarchy over the wife. On top of all of that, there cannot be a community exposition of masculine dominance. The judgment passed is a step towards gender neutrality but certainly, it is already become too late to know what all hardships a woman have faced. The absence of understanding the concept of gender neutrality by the courts after having the provisions laid down in the Constitution has resulted in the prima facie violation of women's independence.

In *Independent Thought v. Union of India*, a division bench of the Supreme Court of India read "Exception 2" to Section 375, Indian Penal Code (hereinafter, IPC), which now stands thus altered which stated that sexual intercourse by a man with his wife, the wife not being less than 18, is not rape. Before the provision stated that the age was to be 15 years instead of 18 years. Sexual violence apart from being a de-humanizing act is an unlawful intrusion of the right to privacy and sanctity of a female. It is detrimental to her supreme "honour" (which is also backward, as women are not an object) and offends her self-esteem, well-being and dignity- it degrades and humiliates the victim where she is a helpless innocent child, it leaves behind a trauma she could very likely never recover from. The "traditional practice" being referred to in the case deals with child marriage and the rights secured to women.

The IPC sanctified the practice by allowing the husband of a girl child to have sexual intercourse with her, regardless of her consent, provided she was not under the age of 15. The Court identified the harm that the right of the girl child to maintain her bodily integrity is destroyed when her husband is given full control over her body, thereby reducing her to nothing more than his property. Thus, the basis of the violation of Article 21, as identified by the Court itself, applies equally, and in the same way, to adult married women, as it is to child brides. This judgement stood strong on the grounds of equality and justice for women and throws out the patriarchal laws that were once prevalent in our country.

Conclusion

In the post-independence era, although much has been done for the liberation and betterment of women, yet it cannot be said that they are fully free from the clutches of male domination. In practice, there is no equality between men and women. Establishment indeed delivers equivalent chances for women indirectly as they are appropriate to all individuals regardless of their gender, but the court realizes that respective articles reproduce only equivalence towards women. They also have not considered speeding up de facto impartiality to the amount of Constitution proposed. Replicating this in *Dimple Singla v. Union of India*, the Delhi High Court uttered its

nervousness that except, elimination and attitudes, change of judgment in contradiction of women cannot be attained. There is also a significant space between the rights of Constitutional as well as its use in the everyday lives of maximum women. Accordingly, it is also truthful that the females are employed in jobs that are previously entirely the majority of male domains, and they should be free from sexual harassment at their workplaces. They should be able to work in a healthy and safe work environment, without having to resort to “quid pro quo” to get ahead/grow in their career. Hence, there are consistent occurrences that reveal the absence of self-assurance and confidence in their competence and productivity. Their remnants an extensive and persistent doubt concerning their capabilities to fulfil the challenges of the assigned job. These obstacles disturb the self-respect of those women who are working. A point to be added is that feminism should be intersectional, and across all classes and sections of society. While women should not be forced to have sex, they should be free to adopt a sexually liberated lifestyle without facing condemnation from society, whether married or not. It is believed that even though the constitution has inherently feminist principles, the application is not there in real life. Few regressive terms in the law like “honour” and “modesty” contribute to maledominance. There needs to be the progressive realisation of rights beyond the interpretation of women needing to be protected.

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