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AN OVERVIEW OF WOMEN'S RIGHT TO EQUALITY: OPTIMISM IN INDIA AND U.S.

Under the Guidance and Supervision of

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ANUBHUTI MISRA

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PREFACE

Women's rights have been the centre of equality issues. Women take a unique position in almost all modern and existing societies. In concatenations, women are exposed to denial of almost all their fundamental rights because they are scaled-down by an unjust administration system on the cornerstone of discriminatory or biased attitudes, practices and theories prejudicial disparities between males and females. Women continue to undergo severe family and social handicaps manifested in systems, despite enactment and progressive interpretations by the judiciary. The fact, in practice, remains that women have not yet realised equal status as males in society.

With the feminist movement's growing firmness, the researcher has based this study on Indian jurisdiction to understand the nuances of equality laws meant to undo the historic and continuing injustice. Indian commitment to affirmative action and protective discrimination to alleviate centuries of exclusion of women from politics, education, and public employment is notable. It hence warrants a comparison with its American counterpart.

Under its constitutional framework, India authorises "special" provisions for women and other historically disenfranchised groups, women's reservation in legislative bodies, municipal corporations, and public employment. In contrast, the U.S. Constitution guarantees equal protection of the law without explicit designation to the intended beneficiaries. As per the different constitutional and cultural aspects prevalent, different equality theories are incorporated in both countries' judgments. This research endeavours to study and explore 'how the respective equality guarantees' have been interpreted and applied to women justice issues by the Supreme Court of India and the U.S. Supreme Court.

STATEMENT OF PROBLEM

Both the Indian and U.S. Constitutions provide a guarantee of equality which acts as a safety valve against gender-discrimination practices. However, to address gender inequality in the context of existing in-equilibrium between men and women, both the Constitutions entail provisions different in nature.

OBJECTIVES OF RESEARCH

The researcher's primary aim is:

1. To develop an in-depth comprehension of how different equality theories help interpret equality laws.
2. To understand and analyze the notion of equality in the context of gender justice with a scope limited to women.
3. To analyze both the jurisdictions' approach to addressing women inequality issues.

Thus, the jurisprudence laid down by the U.S. and the Indian Supreme courts is the focal point of this study.

SCOPE OF RESEARCH

Although Equality's notion is a vast ever-progressing concept and indispensable to many other areas of law; Treating all laws, case laws, and doctrines concerning the development of the concept would not be feasible. However, the researcher believes that an overview of constitutional jurisprudence study can guide the same concept in another judicial area. To achieve the above objectives, the researcher shall restrict this work's scope to the study of Equality Jurisprudence adopted by the U.S. and the Indian Supreme Courts while interpreting constitutional Equality before law limited to women in both countries.

RESEARCH QUESTIONS

1. Whether the right to women's equality has been interpreted invariably on the lines of the formal theory of equality in the U.S. jurisdiction?
2. Whether the right to equality concerning women has incorporated effective and meaningful substantive content in the Indian jurisdiction beyond the protectionist regime?
3. Whether the differences in approaches of the Apex Court of the two countries lead to different advancing consequences in addressing women related inequalities?

HYPOTHESIS

There is a stark contrast in the equality jurisprudence reflecting the differences between the U.S. and India's constitutional regimes and in particular the approach of the Apex courts in interpreting gender-injustice matters in both countries.

RESEARCH METHODOLOGY

The researcher has adopted doctrinal methodology to conduct the research and has employed analytical and critical tools of research. Researcher has relied on primary and secondary sources of data which involves collection of data from various online and offline sources like international cases, statutes, regulations and the books written by various recognized and reliable authors and articles available on different legal databases.

Finally, the researcher has made use of comparative study by comparing the laws and jurisprudence followed in U.S. and India.

REVIEW OF LITERATURE

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Science Association. Chicago: Palmer House Hotel. 2007 https://www.democracy.uci.edu/files/docs/conferences/grad/alexander.pdf

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5. Constitutional Inequality: The Political Fortunes of the Equal Rights Amendment Paperback – May 1, 1985 by Gilbert Steiner.

6. Weale, Albert. "An Anti-Egalitarian Fallacy." *Philosophy* 52, no. 201 (1977): 352-54. Accessed February 11, 2021. http://www.jstor.org/stable/3749592

TENTATIVE CHAPTERISATION

I. INTRODUCTION - The Researcher in this chapter shall give a background to the aspects that will be covered in the paper and divide the discussion into two parts as: Formal & substantive equality theories; Brief difference in both countries w.r.t constitutional framework and approach in areas of gender inequalities.

II. RIGHT TO EQUALITY W.R.T. WOMEN IN INDIA – The Researcher in this chapter shall give an overview of the gender inequalities in the country and provide an analysis of Constitutional Provisions: understanding bare text of Indian Constitution; Substantive inequalities due to Protectionist approach?

III. RIGHT TO EQUALITY W.R.T. WOMEN IN US – The researcher in this chapter, comparing to the notions of equality discussed in relation to India, shall discuss the Constitutional provisions of U.S. Constitution; Theory of Separate Sphere and False Equivalence.

IV. EVOLVING JURISPRUDENCE: PLUGGING OR WIDENING THE GAP – Neo-liberal appropriation to ideals of equality. Theory of positive grants to substantial model of Equality.

V. CONCLUSION

ABBREVIATIONS

ADDL. - Additional
AFP- Air Flight Pursers.
AH- Air Hostesses
AIC- All India Cases
AIR- All India Report
Anr. – Another
Art. - Article
CEDAW- United Nations Convention on the Elimination of All Forms of Discrimination Against Women
Const. – Constitution
CRPC - The Code of Criminal Procedure, 1973
e.g. - Example
ed. – Edition
ERA – Equal Rights Amendment.
etc. - Et cetera
HC – High Court
ICCPR- International Covenant on Civil and Political Rights
IND- India
IPC – Indian Penal Code
ISBN- International Standard Book Number
ISSN- International Standard Serial Number
Ker – Kerala
MTP – Medical Termination of Pregnancy
No. – Number
Ors- Others
par. - Paragraph
PDA – Pregnancy Discrimination Act
PIL – Public Interest Litigation
RP – Review Petition
S.B. – State Bill

SC – Supreme Court
SCC- Supreme Court Cases
SCR – Supreme Court Report
SCW - Supreme Court Weekly
SLP – Special Leave Petition
UDHR - Universal Declaration of Human Rights
UN- United Nations
UNDP- United Nations Development Programme
UOI – Union of India
UP- Uttar Pradesh
US – Unites States
v. – versus
WP (C) – Writ Petition (Civil)

TABLE OF CASES

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- Grutter v. Bollinger, 539 U.S. 306 (2003)
- Hoyt v. Florida, 368 U.S. 57 (1961)
- Indian Young Lawyer's Association v. State of Kerala, RP (C) 3358/2018.
- Indira Sawhney v. Union of India, AIR 1992 SC 477
- JE.B. v. Alabama, 511 U.S. 127 (1994)
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- Reed v. Reed, 404 U.S. 71 (1971)

- Roe v. Wade, 410 U.S. 113 (1973)
- Rostker v. Goldberg, 453 U.S. 57 (1981)
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- Stanton v. Stanton 421 U.S. 7 (1975)
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- Suchita Shrivastava v. Chandigarh, AIR 2010 SC 235
- Swati Agarwal v. Union of India, WP (C) 825/2019
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- United Automobile Workers v. Johnson Controls, Inc, 499 U.S. 187
- Vasantha R v Union of India, (2013) 8 SCC 519
- Vijay Lakshmi v. Punjab University AIR 2003 SC 3331
- Vineeta Sharma v. Rakesh Sharma, Civil Appeal 32601/2018
- Vishaka v. State of Rajasthan, AIR 1997 SC 3011
- Whole Woman's Health v. Hellerstedt, 579 U.S. 582 (2016).
- Yusuf Abdul Aziz v. State of Bombay AIR 1954 SC 321

AN OVERVIEW OF WOMEN'S RIGHT TO EQUALITY: OPTIMISM IN INDIA AND U.S.

"Woman is the companion of man, gifted with equal mental capacity"

- Mohandas Karamchand Gandhi[1]

CHAPTER I

I. INTRODUCTION

Equality is an idea habitually vaunted and purportedly applied however inconsistently genuinely interrogated. Inequalities of women to men, half of humankind's inequality to the other half, with each gathering containing numerous variations and inequalities, provides a strong representation of the customary equality model's disappointment. Its standard approach, which is viewed as its common-sense meaning, is the formal equality notion utilised in many jurisdictions like the U.S law. This conception is based on Aristotle's formulation that equality means treating likes alike and unlikes un-alike.[2] Equality has been chronicled as a "treacherously simple concept"[3]. Nevertheless, a diverse spectrum of opinions exists regarding equality and what a society should do to incorporate and promote this value. In many jurisdictions, affirmative action programs for preferential treatment to specific groups or individuals based on characteristics such as gender and ethnicity are conceived as discriminatory and inconsistent with the right to equality. Constitutional provisions explicitly authorizing the adoption of affirmative action programs are often envisioned as exceptions to exemptions from or restrictions on the general principle of non-discrimination. The underlying conceptions are usually explained in terms of two distinct equality theories: (i) formal and (ii) substantive. The rationale underlying the principle of non-discrimination and the right to equality would be formal equality. On the other hand, the rationale underlying the affirmative action scheme would be substantive equality.

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[1] *Mahatma Gandhi and Empowerment of Women*, MKGANDHI.ORG, https://www.mkgandhi.org/articles/womenempowerment.htm (Last visited Feb. 21, 2021).
[2] See Aristotle, Robert Williams, trans., The Nicomachean Ethics of Aristotle (Longmans Company 1876).
[3] Holtmaat Rikki, "*The Concept of Discrimination*", 2 (2004), http://www.era.int/web/en/resources/5_1095_2953_file_en.4193.pdf (Last visited Feb. 21, 2021).

The principle of equality and non-discrimination has undergone a gamut of interpretations. Treatment as equals transfers the focus of analysis to whether the purposes for the deviation between persons are consonant with equal concern and respect. Such interpretations of equality offer a range of varied conceptions and provide a comprehensive moral footing regarding the spheres of society it can penetrate.

The idea of formal equality is the most general understanding of equality in the contemporary world. Formal equality advocates individual justice as the foundation for a moral claim to virtue and relies upon the premise that fairness entails consistent or equal treatment. The approach of formal equality is to overlook the personal characteristics of an individual entirely. Whilst the principle of consistent treatment has a role in society, the richness and complexity of present-day life and modern social relations makes the applicability of this approach overly simplistic as a basis for integrated and comprehensive equality norms and measures. Articles 1 to 5 and Article 24 synchronically provide that State parties under CEDAW[4] are obliged to go past the formal interpretation of equal treatment amid men and women. Such limitations on the formal approach are to counter and advance the de facto spot of women and address predominating gender relations the persistence of gender-based stereotypes that affect women.[5] In contrast, a substantive equality approach focuses not simply on the equal treatment of law but instead on the law's actual impact. This approach recognises that treating unequal as equals only widens the disparity between the two contesting categories.

Social scientists have documented dramatic change in gender inequality in the last half-century, sometimes called a "gender revolution." The human development perspective and the classical modernisation perspective offer theories to explain why modern societies are more conducive to gains in gender equality. The beginning of the twenty-first century had witnessed the culmination of decades of dramatic progress in addressing many of the most significant barriers to equality—from discriminatory laws to the inaccessibility of essential services and institutions. Across every region, countries have begun recognizing the right to equality regardless of sexual orientation and gender identity. This progress is remarkable and worth

[4]It aims to eliminate every form of discrimination against women, including eliminating the causes and consequences of their de facto or substantive inequality.
[5]See Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), General recommendation No. 25, on art. 4, para 1 on temporary special measures, para6, https://www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20(English).pdf. (last visited Feb. 22, 2021).

celebrating. However, we know that exclusion persists and that countless daily experiences of discrimination and bias contribute to women's devastating disparities. The foundation of nearly every nation's legal system can be provided in their Constitutional Framework, and many of their core functions are mostly consistent across countries. It expresses values and embodies contracts between governments and their people to realise those values. A constitution can significantly shape and influence social norms in a nation. Historically, women are the largest global population to have been systematically excluded from enjoying fundamental rights in constitutional texts and other laws. One of every two people, women and girls, was denied the right to vote, excluded from workplaces and schools, and prevented from full participation in the economy. Both within individual countries and globally, equality rights have often moved forward erratically—not for everyone together. Here the question arises whether every constitution guarantees' women and girls equality rights. Gender inequality has a grim and pervasive history in both the United States and India.

Women's rights have been the center of equality issues. Consequently, both the Indian and U.S. Constitution's guarantee equality before the law - India's Constitution expressly mandates equality for women. The U.S. Constitution ensures equal protection of the law without any explicit designation of intended beneficiaries. Around the world, lawyers, civil society groups, and concerned citizens have used their constitutions to speak out against discriminatory rhetoric and practices, empower people to know and claim their right to equality, and bring court cases that have transformative nationwide impacts. With the feminist movement's growing firmness, the researcher has based this study on Indian jurisdiction to understand the nuances of equality laws meant to undo the historic and continuing injustice. Indian commitment to affirmative action and protective discrimination to alleviate centuries of exclusion of women from politics, education, and public employment is notable. It hence warrants a comparison with its American counterpart.

This research is an endeavor to study and explore how the respective equality guarantees have been interpreted and applied to women justice issues by the Supreme Court of India and by the U.S. Supreme Court. The different theories of equality are incorporated in the judgments of both the Courts. The U.S. Supreme Court emphasizes a formal equality model that requires that all persons similarly situated be treated the same. However, the court's perusal of some pronouncements reflects how it has departed from the strict notion of formal equality. Significantly as the scholars suggest, equality of opportunity has been the essence in the U.S.

context[6]. Formal equality does not acknowledge the differences. However, in the U.S jurisdiction, the application of substantive equality is evident in cases where it has admitted the relevant differences in arriving at conclusions[7]. *Roe v. Wade's* decision is a classic example justifying this point of adoption of substantive content where a pregnant woman was held to have a fundamental right to abortion, thereby acknowledging the condition of pregnancy. A classic example of the equality clause that has been interpreted to impart substantive content is the *Roe* case[8] that has led to the invalidation of state laws. Formal equality theory is what the Supreme Court of India relies on. Still, because the Constitution of India authorizes "special" provisions for women and other historically disenfranchised groups, women's reservation in legislative bodies, municipal corporations, and public employment[9], it provides the framework for the development of the substantive model.

Ultimately, roles of the Supreme courts' in India and the United States mirror the contrasts between the two constitutional regimes. Albeit the two constitutions make equality a core value and restrict the State from refusing to confer equal protection of the laws, the Indian Constitution also contains a positive grant of power to the public authority to take steps to wipe out inequality. The U.S. Supreme Court has not deciphered the equality guarantee to give any positive rights; hence one can say that this mandate is not found in the U.S. Constitution. In lieu, the U.S. Supreme Court has adhered to formal equality hypothesis, initially to depend on women's weak physical structure and maternal capacity to maintain gender classifications and, as of late, to deny the presence of gender differences to strike down sex classifications. However, the adherence to formal equality has not been consistent as the Apex Court has employed substantive content in interpretation concerning equality issues. The Court has, in many instances, acknowledged the differences between different sexes, thus categorically departing from the theory of formal equality.

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[6]John Hasnas, *Equal Opportunity, Affirmative Action, and the Anti-Discrimination Principle: The Philosophical Basis for the Legal Prohibition of Discrimination*, 71 FORDHAM L. REV. 423, 429-41 (2002).
[7]Atlanta, *The legacy of Roe v Wade*, THE ECONOMIST, https://www.economist.com/democracy-in-america/2013/01/22/full-court-press (Last visited Feb. 22, 2021).
[8]Roe v. Wade, 410 U.S. 113 (1973).
[9]INDIA CONST. art. 243D -In addition to Article 15(3)- authorizes special provisions for women, and Article 243D- authorizes reservations for women on panchayats, India's Constitution expressly authorizes reservations for Scheduled Castes, Scheduled Tribes, and other backward classes.

A comparable set of formal equality decisions have been issued by the Indian Supreme Court, although it has not significantly moved past the protectionist stage. Even so, the Indian Supreme Court, placing reliance on constitutional provisions and international covenants, has of late been willing to drift from its constancy to formal equality theory. The Court has cognized that formal equality can stand in the way of true equality and, at least for interpreting personal laws, upholding reservations for women, and seeking to ensure women's freedom from sexual violence, has adopted jurisprudence willing to acknowledge and compensate for the disadvantaged. The recognition by courts that compensating for discrimination is not an exception to equality, but a means of achieving equality is the relevant pointer in this context.[10]

However, the effectiveness in applying the equality clause beyond the protectionist regime has been debatable, as Indira Jaising points out in the context of *Nergesh Meerza v. Union of India*[11]. The Apex Court, in its analysis in the judgment, reflects an ironical stance of the Court reading into non-discriminatory provisions of the Constitution to justify discrimination. The fact that the Court yields to arguments such as allowing female air hostesses to mature by delaying their marriage prospects to ensure successful marriages is based on a patronizing view of sex and gender and an appropriation of women's autonomy[12]. Court views women as incapable and in need of direction from the state. Along these lines, while striking down the pregnancy condition, the Court builds up the generalizations related to women's reproductive role by embracing a position of protecting "the most sacrosanct and cherished institution" of Indian womanhood, i.e. pregnancy. It is not because it is noxious for the state to manage women's decisions or build up cliché roles for them[13]. Both India and U.S. show dramatic progress in moving toward gender equality between 1970 and 2018. However, in recent decades, some indicators show a lag and insinuate that further progress requires substantial institutional and cultural change, even on the part of the Court's reasoning'.

[10]Indira Sawhney v. Union of India, (1992) 3 S.C.C. 212 (India).
[11]Air India v. Nargesh Meerza, AIR 1981 SC 1829 (India).
[12]Gautam Bhatia, *Sex Discrimination and Constitution-VI: The Discontents of Nergesh Meerza*, LEGALLY INDIA.COM, https://www.legallyindia.com/Blogs/sex-discrimination-and-the-constitution-vi-the-discontents-of-air-india-v-nargesh-mirza (Last visited Feb. 26, 2021).
[13]Ibid.

Thus, even if the right rulings are arrived in discrimination cases, the uninspiring reasoning embedded in state protectionism genuinely diminishes the possibility of worthwhile sex discrimination jurisprudence, let alone a credible treatment of intersectional discrimination.[14] In the Air India case, the Indian Court's analysis is a striking example of how principles of equality and non-discrimination can be construed to ignore and, in fact, justify discrimination that cannot neatly fit into a transfixed and non-interactive category of sex discrimination. This myopic vision embedded in the Court's reasoning is dealt with, particularly in the chapter on the Indian jurisdiction.

[14]Indira Jaising, "*Gender Justice and the Supreme Court*" in Kirpal, B.N. et al (eds.), Supreme But Not Infallible: Essays in Honor of the Supreme Court of India, 294 (Oxford India Paperbacks 2000)

CHAPTER II

II. RIGHT TO EQUALITY W.R.T. WOMEN IN INDIA

Gender equality has always been an evanescent concept in history, trampled with stutters of society's prejudiced mindedness, which took fiendish delight in suppressing women's rights. History has perpetually professed the value of gender-neutral laws, which has led to manifold developments in the social structure of society. Before the nineteenth century, women found themselves crushed and subjugated by the male patriarchal ideologies and approaches. However, there was a feminist identity consciousness and recognition of their predicament. Nevertheless, this awareness did not get transposed into open and coordinated strife for selfhood and survival. There are diverse narratives whereby women challenged and went against the establishment, substantiated in the accomplishments of Muktabai, Ahilyabai Holkar, Rani Lakshmibai of Jhansi, and the likes. Women throughout the chronicle made attempts to break free from the shackles of persecution and discrimination they had to face by virtue of their birth.

In India, women are treated with respect and admiration tantamount to that of Goddesses. Despite this, respect that is widespread in the culture rarely eventuates equality between the two sexes. The connection between laws and religion in this nation are interlinked, for they are reliant upon each other, with the former reaping its legislative support from the latter. The process of introducing progressive laws in British India dates back to 1829 when the then Governor-General of India William Bentick abolished the evil practice of Sati. The circumstances since then have changed to a great extent, and the Indian lawmakers and the Indian courts have played a major significant role in this change while interpreting these constitutional provisions and laws.

The Constitution of India acknowledges this intention of progressive India; it serves as the foundation and framework for the formulation and implementation of national legislation and policies; therefore, the forefathers, realizing this fundamental need, ensured to incorporate the

same as a fundamental right in the constitution. The Indian Constitution grants equality to women. It empowers the State to adopt positive discrimination measures favouring women for neutralizing the cumulative socio-economic, educational, and political disadvantages they face.[15]

Despite such provisions, biased culture is still being eradicated as India is still a developing state. The country has steadily marched towards achieving women's inclusivity in all sectors and has introduced numerous laws to achieve this object in the pursuance of the same. India has, although not fared poorly in terms of political empowerment; the statistics would show an extensive gap in the percentage of women in the parliament and securing ministerial positions. It cannot be emphasized enough that the inclusion of women judges in the higher judiciary will considerably advance the quality of justice delivery. The higher judiciary in India, which includes the Supreme Court and the high courts, currently has no reservations for women. There is a need for urgent correction in the State of affairs concerning the suppression of women. The fact that the current Chief Justice Ramana of the Supreme Court of India wholeheartedly supports leads that will promote the cause of eliminating gender inequality[16] and the jurisprudence adopted by the courts is the very indication of optimism for women's right to equality in the country.

[15]INDIA CONST. art. of specific importance in this regard are - 14; 15; 15(3); Art. 16; Art 39(a); 39(b); 39(c) and art. 42.

[16]"It is your right": CJI Ramana presses for 50% representation of women in judiciary,THELEAFLET.COM, https://www.theleaflet.in/it-is-your-right-cji-ramana-presses-for-50-representation-of-women-in-judiciary-says-womens-under-representation-in-the-legal-profession-needs-urgent-correction/. (last visited Sep. 27, 2021).

II.I Understanding the Bare Text

In this chapter, the researcher has endeavoured to reflect upon the nuances of equality concerning women in India. For the purpose of understanding the nuances and dynamics that affect women's substantive equality in India, it is first essential to understand the Constitutional text laying down the framework for equality concerning women. It is no assumption but a concrete fact- all around us- that women in India have been suffering a structural and historical disadvantage. These same disadvantages are that the Constitutional forefathers' incorporated provisions exclusively meant for women, given the grim history. The consequence of this resulted in the incorporation of equality provisions, woven all throughout in the Indian Constitution, designed to remedy this substantive inequality that has plagued the gender dynamics for long- to the extent of becoming a social evil in times to come.

The Indian Supreme Court has been the helm of interpreting the Constitutional provisions regarding women equality following different approaches, both progressive and myopic, with the former more palatable. Its bandwidth primarily includes formal interpretation and substantive interpretations, with protectionism being a decisive approach to interpreting the Constitution's provisions. The approach adopted by the Apex Court's finds its roots firmly rooted in the Indian Constitution in furtherance of the spirit and essence of the Articles 14, 15 and 16 of the Constitution's Part III. The fact that women's right to equality finds itself in an exclusive positive grant system rooted in Article 15(3), as pointed out in the preceding chapter. On its face, Article 15 (3) mandates the State to make special laws for 'women' -- in effect, discriminating in their favour. A stipulation of this kind suggests that the provision does consider the historical and systemic processes through which discrimination against women has been effectuated, making the State accountable for doing away with it through 'protective' and proactive laws. However, in the absence of a substantive equality approach in the judicial interpretation of Article 15 (3), there is scant consideration of whether the laws actually 'protect' women or create 'protectionist' measures to safeguard 'good' women's honour and chastity.[17] It

[17]Oishik Sircar, *The Fallacy of equality*, Centre for Communication and Development Studies, 67-68 (2008), http://www.ccds.in/download/publication/agenda/agenda_13.pdf (Last visited Apr. 4, 2021).

is poised to provide room for new interpretations and, at times, reconciling with the norms produced by the western jurisdictions and international conventions.

India's Constitution provides a protectionist discrimination approach for the vulnerable that have historically been denied basic fundamental rights. Women have been worse off amongst this vulnerable group despite the right to equality firmly rooted in the Constitution. The equality principles are woven throughout the Indian Constitution. Article 14 is just the starting point that provides equal protection of laws; that resemble the equality clause principle under the U.S. Constitution. The Constitution includes Article 15(1), which prohibits discrimination based on sex and Article 15(3), which provides for positive discrimination for women and children. It is pertinent to note that all these Articles are under the Part III of the Constitution, thereby enabling to invoke Writ jurisdiction as they are enforceable in the court of law: the High Court and the Supreme Court.[18] Therefore, Article 15(3) becomes a potent tool for the Legislature to further the interests of these particular categories of which women find themselves at the centre of such a protectionist regime. At the same time, the judiciary has used Article 15(3) as armour for the benefit of women.[19] In hindsight, we can see laws like the Domestic Violence Act 2005, along with another handful of laws have been enacted in keeping up with the substantive provisions of the Constitution. In the same part III, Article 16 provides for non-discrimination in public employment and article 16(3) further provides for special provisions for the special and economic backward class. While all of these Articles part of Part III are justiciable, the subsequent part IV of the Constitution further consolidates the scope for Substantive interpretation with respect to equality.

The Constitution's Part IV, which provides for the Directive Principles of the State policy, contains Articles providing for the emancipation of women, maternity relief, equal pay equal work, which essentially needs to be taken into consideration in the formulations of policies and include it in the governance of the country. It even has a fundamental duty under Article 51(A) (e) of the Constitution, providing renouncing derogatory practices to women's dignity. It is equally crucial given how society reinforces its stereotypes and archaic gender norms, which prejudices women's interests even in the 21st century, where India considers itself to march into the category of developed nations. The equality provisions were perhaps not enough as per

[18]The High Court has wider powers under Article 226 for writ jurisdiction compared to Supreme Court's power under Article 32.
[19]The recent Triple Talaq judgment is an apt example; Shayara Bano v. Union of India, (2017) 9 SCC 1 (India).

the Constitutional forefathers. They thought it necessary to include such provisions apart from the right to equality to bring equality in spirit and not just a textbook case for equality.

In this background, it is pertinent to note that the Indian Constitution is different rather radically when compared to the U.S. Constitution. This difference in the approach is rooted in the very provisions that recognize the underlying principle that Formal Equality is inadequate in the Indian context given the historical injustices and the social milieu prevalent even in the 21st century. The law has played a keen role in shaping the perspective and protecting the legitimate interests of the often undermined gender. The Supreme Court, on the other hand, in particular, has put efforts to give a broad and expansive interpretation to the text of the law, both the domestic law and the international law. In a series of Indian judgments, the courts highlighted the issue where provisions like Article 15(3) and 15(4) have been categorically interpreted substantially without the negation of the right to equality. The Courts have asserted, such provisions need to cater to the historical injustices in an inequitable societal setup. It is these provisions that provide the remedy to such inequitable pattern in society.

II.II Substantive Inequalities Due To Protectionist Approach?

In this chapter, the researcher tries to illustrate what could be called the "fallacy of equality", where despite the constitutional guarantee of equal protection of the law, judicial interpretation reinforces 'Formal Equality', in effect maintaining the *status quo* of 'substantive inequality' in the lives of disadvantageously-situated women. The protectionist regime is perhaps the usual reward, to inequality issues, in pursuit of protecting women.[20] Thus, in the process of guaranteeing equality, the system seeks to negate the plurality of experiences.[21] The Right to equality and non-discrimination are guaranteed by the Indian Constitution. But is it ensuring only a 'Formal Equality' while in effect maintaining the status quo of *'Substantive Inequality'* in the lives of disadvantageously situated women? The protectionist attitude does not effectively address the issue of substantive inequality; perhaps it only further consolidates the gender roles perpetuated by society making it more rigid by imparting judicial authority to it. The chequered history of Indian constitutionalism has given reason enough to repose our faith in the fundamental rights provided under Articles 14 and 15. Constitutional guarantees have been effectively used to expand their reach to protect many forms of human rights and strike down laws against the tenets of equality and non-discrimination. However, even these pillars of the rule of law seem to falter when dealing with historical and structural disadvantage. Women are victims of this structural disadvantage, and only meaningful, substantive interpretation beyond the protectionist regime can be a workable solution to the situation.

Although the law often fails to deliver its utopianised promise of protecting the rights of citizens, it continues to declare its authority, which is claimed to be derived, in part, "through scientific, legal method and rigor, and its projection as a unified discipline with an internally coherent logic that is transcendent and divorced from the world". Because of this illusionary reason, the law, despite its in-built biases, continues to be used by those very people to claim rights, who are at the receiving end of the violence of the law.[22] It does not mean that these

[20] Oishik Sircar, *supra* note 14.
[21] Ibid.
[22] Tarunabh Khaitan, *A Theory of Discrimination Law,* 159–162 (Oxford University Press 2015).

standards should be ignored -- merely that more strategic politics is required for engaging with the law.

Primarily there are three accounts where equality for women suffers a setback.[23] Firstly, the premise of equality and non-discrimination in the judicial interpretation of constitutional guarantees is more 'formal equality' centric approach than a 'substantive equality' one. Even if the Courts have tried to interpret substantially, it has put its foot on the protectionist regime and has not moved beyond it meaningfully. Second, the Constitution has been ineffective in responding to intersectional forms of discrimination, where the incidence of disadvantage is most acute. Third, these 'basic' constitutional guarantees lay claim to a 'universal truth' about the operation of the rule of law -- where "the law is understood to be insulated from all kinds of influences, and to be above all 'worldly' considerations -- and thus ignores the fact that such a claim resides in the ideal rather than the actual practice of law".[24] This understanding of equality follows the formal equality approach, where equality is understood as sameness. In effect, only if one can become the same will one be treated equally. To decide whether one qualifies to be 'same', the court has first to classify the groups in question, claiming equality so that they can be compared to find out whether they are the same or different. If it is established that the classified groups are differently placed, then such difference will justify differential treatment. Thus, judicial interpretation suggests that when classified groups do not qualify to be the same or similarly situated, they do not qualify to be equal either, even if their differences result from historical or systemic discrimination.

The first step in ascertaining whether Article 14 has been violated is a consideration of the situation, whether the persons between whom discrimination is alleged to fall within the same class. If the persons are not considered to be similarly circumstanced, then no further consideration is required.[25]For instance, while considering the example of Section 66 of the Factories Act, 1948, women are prohibited from working in factories during the night on the grounds that they are vulnerable to violations during night-time hours of work. If one were to challenge this section as violative of Article 14 because it treats men and women unequally, such a challenge would fail. According to the doctrine of 'intelligible differentia', the

[23]Ibid at 163.
[24]Ratna Kapur, *'Travel Plans: Border Crossings and the Rights of Transnational Migrants'*, 18 Harvard Human Rights Journal, 109 (2005) https://harvardhrj.com/wp-content/uploads/sites/14/2020/06/18HHRJ107-Kapur.pdf. (Last visited Apr. 8, 2021).
[25]Ibid at 110.

classification between male factory workers and female factory workers is reasonable. Thus, differential treatment between them is justified in law.

As was held in the case of *Chiranjit Lal Chowdhury v Union of India*[26], the keystone of the article is that all persons 'similarly circumstanced' shall be treated alike, both in privileges conferred and liabilities imposed. The rule is that 'like should be treated alike and that 'un-like should be treated differently. The means for these 'differently placed' groups to use this article to claim their right to equality would be to 'become same' as the classified group compared to which they are being treated unequally. Such interpretations of formal equality also imply that equality is predicated on certain normative standards: one can only become equal to that standard. The substantive equality approach moves beyond looking at equality merely as a guarantee lettered in law to one that looks at the law's actual impact to do away with substantive inequality. The primary aim of a substantive equality approach is not to harp on the guarantee of equality as being predicated on an understanding of sameness and differences, but one that "takes under consideration inequalities of the social, economic and academic background of the people and seeks the elimination of existing inequalities by positive measures".[27]

In other words, the substantive equality approach attempts to correct the historical and structural reasons that result in disadvantaging a particular group. Therefore equality issues with respect to women have to be in line with this idea of equality which aims to remedy the substantive inequality which has obstructed the spirit of equality and not just remains to be a textbook case for equality. The judicial pronouncements, in this sense, have the potential to evolve jurisprudence suitable to the rigours of equality dimensions and certainly beyond the societal perspective of gender dynamics. Such an understanding of 'progressive discrimination' on the grounds of sex can serve as a justification for the constitutional validity of the Immoral Traffic Prevention Act -- purported to be a legislation that is meant to rescue and rehabilitate passive and agency-less women from the scourges of prostitution -- completely undermining the fact that it is the existence of the law that perpetuates the 'violence of stigma' against women in prostitution, and gives the police a free hand in apprehending and incarcerating them as criminals. All this interpretation apparently is for women's empowerment; ironically, it consolidates the very gender roles the society has created. Therefore, in the name of 'protecting

[26]AIR 1951 SC 41 (India).
[27]Ratna Kapur, & B, Cossman, *'On Women, Equality and the Constitution: Through the Looking Glass of Feminism*', 1 National Law School Journal, at 2-3 (1993).

women, norms are created, which fundamentally serves as putting females on other pedestals as that of men, which, in turn, skews the very gender dynamics which such Constitutional provisions ideally should address. Similarly, suppose one were to challenge the Maharashtra government ordinance that banned dance bars[28] because it violated Article 14 and 15 (1). In that case, such a challenge could have been struck down by the courts on the basis that 'bar dancers' are a reasonable classification in comparison to 'other more respectable women', and that in connection with Article 15 (3), the ordinance would actually protect the 'helpless' bar girls. However, the Apex Court did realize the gravity of the issue. Eventually, it struck down the ban on the grounds of unconstitutionality in the *State of Maharashtra v. Indian Hotels and Restaurants Association*.[29]

This stance by the Indian Supreme Court proved to be a watershed ruling that proclaimed new daybreak for women's rights in society. Women rights activists have extensively lauded the decision. A similar progressive approach reflected in following judicial orders has been a forerunner of optimism for those unfavorably affected by such legislation and societal practices. In attempts to exclude the root of the 2013 judgment, the Maharashtra Police (Second Amendment) Act, 2014 and Dance Bar Regulation Bill, 2016 were legislated, revoking Section 33-B to waive the defect of arbitrary discrimination and provide acrimonious requirements that claimants need to meet for obtaining a dance bar license. The Supreme Court stayed the 2014 provision while for the 2016 rules, it slammed these stipulations as "ridiculous" and "regressive" and restored the old terms.[30]

Incidents of sex or gender will no longer be ousted from the prohibition of sex discrimination or justified as protective discrimination without scrutiny[31]. The decision in *Anuj Garg v Hotel Association of India*[32] is seminal in this respect. In this case, the law at issue was directly discriminatory – i.e., the law, in its very wording, created two categories (men and women) that were composed entirely and exclusively by the two sexes. This case involved a constitutional challenge to a statutory provision that prohibited the employment of any woman on premises in which liquor was consumed in public. In declaring the provision

[28] Maharashtra Police Act (1951), § 33-A, 33-B vide Bombay Police Amendment Act, 2005.
[29](2013) 8 SCC 519 (India).
[30]Indian Hotel & Restaurant Association v. State of Maharashtra, 2019 SCC Online SC 41 (India).
[31]Gautam Bhatia, *Culmination of Anti-stereotyping principle in Anuj Garg*, LEGALLYINDIA.COM, https://www.legallyindia.com/views/entry/sex-discrimination-and-the-constitution-x-the-culmination-of-the-anti-stereotyping-principle-in-anuj-garg (last visited Apr. 8, 2021).
[32]Anuj Garg & ors vs. Hotel Association of India, AIR 2008 SC 663 (India).

unconstitutional, the Supreme Court denied an interpretation of the Constitution based on "romantic paternalism" of the State, which reinforced "incurable fixations of stereotype morality and conception of sexual role." Thus, the Court proposed that the test to review protective discrimination under 15(3) should be one of heightened scrutiny such that the consequences and effects of legislation are examined and not just its stated aims.[33] Thus, the Court acknowledges that protective aims cannot be justified without proper scrutiny and certainly cannot be justified when they override women's freedom, personal autonomy and dignity.

Anuj Garg case sets correct the contextual view of sex discrimination as one based on the biological category of sex under clause (1) and the unquestioned protectionism of the state under clause (3). However, what remains to be addressed is the problematic approach of justifying discrimination based on more than one ground. Indeed, this particular case has provided the foundations for a progressive approach of Constitutional interpretation for equality issue with respect to sex under both Articles 14 and 15 of the Constitution. The case is particularly progressive given that it invokes what can be phrased as anti–stereotyping of sex-based dynamics. The Bench also relied mainly on American cases to arrive at a conclusion[34] which will be dealt with in the subsequent chapter. Therefore this particular case is indeed progressive because it has defied the traditional concept of gender roles and separate spheres. It certainly is a landmark in that sense, given the grim record of the Court in the past. It, in essence, feeds on the principle of anti-stereotyping, which categorically rejects justification of distinction in law based on biological differences between men and women. The so-called difference itself will have to be interrogated to understand whether its roots lie in historically perpetuated stereotypes of gender roles and differences that have become so entrenched that they now appear natural.[35]Furthermore, perhaps, more importantly, culture and tradition – that, historically, have been invoked to endorse great suppression – cannot constitutionally dictate how freedom of choice, privacy, and autonomy can be understood. On an Anuj Garg conception, provisions like the marital rape exception, the restitution of conjugal rights, and many others that lock into place a culturally determined definition of what it means

[33]Khaitan, *supra* note 19.
[34]Gautam Bhatia, *Grounding a Progressive Jurisprudence of sex equality*, Indian Constitutional Law and Philosophy (2014), https://indconlawphil.wordpress.com/2014/02/20/grounding-a-progressive-jurisprudence-of-sex-equality-anuj-garg-v-hotel-association/. (last visited Apr. 8, 2021).
[35]Ibid.

to be a man and to be a woman must be tested on the touchstone of constitutional values, and will not be allowed to perpetuate norms that come into conflict with those values.

In other words, the "separate sphere", which, historically, has been the justification for significant suppression, no longer survives as a valid argument. It is the essence of transformative constitutionalism, which we have discussed: through its guarantees of liberal-democratic values of choice, freedom, non-discrimination, autonomy and the rest, the Constitution sought to replace old practices and norms of hierarchy, dominance and suppression that were based on socially or otherwise constructed identities, such as caste, religion, gender etc.[36]

In this light, in the researcher's capacity, it could only be hoped that the seeds sowed by the case contribute to future empowering judgments for women. However, cases like Anuj is not the first of their kind in this context. For example, the Court, in *Vasantha R v Union of India*[37], struck down as unconstitutional a provision of a law that prohibited women from working at night in factories since it was discriminatory on the sole ground of sex.[38] The Indian Supreme Court, while admitting the plea for examining section 497 of the Indian Penal Code[39], had admitted that it is high time for the society to see both men and women on equal footing in every respect and quipped how section 497 of the Indian Penal Code which is a Victorian provision treats a married woman as a subordinate to the husband negating the very ethos of equality or Anuj Garg case for that matter.[40] Section 497 of the Indian Penal Code mandated "Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting the offence of rape, is guilty of the offence of adultery and shall be punished."[41] In *A.M. Shaila v Chairman, Cochin Port Trust*[42], the Court held that the policy decision to not include women in working as shed clerks did not violate Articles 14 and

[36]Ibid.
[37](2001) I ILLJ 843 (India).
[38]Shenoy, D.,*Courting Substantive Equality: Employment Discrimination Law in India* (2013), U. Pa. J. Int'l L., https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1039&context=jil. (Last visited Apr. 10, 2021).
[39]Joseph Shine v. Union of India, [WP. (CRIMINAL) NO. 194 OF 2017] (India) held that Section 497 violates Article 14 of the Constitution, stating it is manifestly arbitrary and creates excessive and disproportionate distinctions based on gender stereotypes.
[40]*Accord* -The Bench overruled its judgments in *Sowmithri Vishnu*, *Vishnu Revathi*, and *Y Abdul Aziz*. These judgments had upheld § 497 as constitutionally valid.
[41]Indian Penal Code 1860 § 497.
[42]1995 (2) LLJ 1193 (India).

15 of the Constitution, noting that "if women are excluded or prohibited from the employment of a particular category only because of their physical structure and special susceptibilities, it means that women have been placed in a "class" because of the distinct circumstances. In such a case, the disavowal of opportunity of employment, however it strikes at women, stops to be 'exclusively' on the ground of sex." In taking note of a portion of the distinctions in "physical structure" and "special susceptibilities", the Court depended upon American cases.[43] In the Anuj Garg case (supra), the Supreme Court did not only settle the controversial debate about whether stereotypes about women's sexual and social roles could be conjured to legitimize a discriminatory and biased law on sex-plus grounds. It additionally settled the contention about whether an Article 15 enquiry was restricted to the intention or purpose of the law or whether it included its effects as well[44].

The constitutionally protected trinity of 'liberty', 'equality' and 'dignity' runs surprisingly deeper than it appears; it is an unwritten moral code that rises above the hypothetical limitations of codified law. *Indian Young Lawyers Association v. the State of Kerala*[45] (popularly known as the Sabarimala case) is one such ambivalent case, adorned with the improvement of progressive women's equality jurisprudence. In favor of women, following the rationale of *Haji Ali Dargah case*[46], the Indian Supreme Court had reiterated the sentiments of B.R. Ambedkar, who said that public temples, similar to public streets and schools, are intended for the general society with no discrimination on any grounds. The right of the religious authority under Article 26(b) cannot outweigh a woman's religious freedom under Article 25(1). Denying women passage into public worship places solely depending on their physiological state is not the mandate of the Indian Constitution. It transgresses the spirit of the right to equality under Article 14. The Sabarimala Case finds another relevant judicial response in the context that even though Article 15 (1) of the Constitution prohibits discrimination based solely on 'sex', it impliedly permits discrimination based on sex coupled 'with some other reason'.[47] The Sabarimala judgment aids the doctrine of 'social inclusion' by reading more profoundly into the significance of 'life and liberty' under Article 21 of the Indian Constitution. Through this

[43]Curt Muller v. The State of Oregon, 208 U.S. 412 (1908).
[44]Anuj Garg v. Hotel Association of India, AIR 2008 SC 663 (India), "*Legislation should not be only assessed on its proposed aims but rather on the implications and the effects".*
[45]2018 SCC Online SC 1690 (India).
[46]Dr Noorjehan Safia Niaz v. State Of Maharashtra, PIL No. 106 OF 2014 (India).
[47]Sabarimala Verdict: A Watershed Moment in the History.., https://www.theleaflet.in/sabarimala-verdict-a-watershed-moment-in-the-history-of-affirmative-action/. (last visited Apr. 10, 2021).

judgment, the Court emphasized that it is the keeper of constitutional conscience and shall not be herded by circumstantial duress or popular morality.[48]

In *Nargesh Meerza*[49], however, *the formation of the cadre was itself based on sex.* Which, by definition, was to say that only women could become Air hostesses (AHs), and only men could become Air Flight Pursers (AFPs). In place of examining whether this *initial* sex-based classification conformed to Articles 14, 15 and 16, the Court instead started by noting that *because* the two cadres' service conditions and promotional avenues were different, they formed separate classes and could legitimately be treated separately. This was strange reasoning by any standards in academia.[50] It viably implies that the guarantees under Articles 15 and 16 are useless; in order to get around them, all one needs to do is to divide their workforce along the lines of sex, caste or religion and give them various names, treat one class in a far substandard way to another, and afterwards justify it by summoning that very separateness of treatment to contest that the two form separate cadres. To put it differently, the Court used the fact that women were being treated less favorably than men to hold that women and men formed separate classes. Therefore, inferior treatment was advocated. The horrendous circularity of reasoning is displayed by the fact that to demonstrate that AFPs and AHs formed different cadres, the Court observed that one of the enlisted recruitment conditions for AHs was that they must be unmarried. Interestingly, in contrast, there was no such condition for the AFPs. As we have seen previously, imposing marriage as a preclusion upon women yet not upon men is in itself a discriminatory and oppressive clause; here, the Court relies upon that as proof that AFPs and AHs form different classes for different treatment.[51]

The issue of denial of women in the inner sanctum in Haji Ali Dargah in Mumbai is a testimony to the draconian inequitable structure of Indian society. Such cases illustrate that the dignity of women is negated and often in the hand of the patriarchal institutions which have patronized the privileges to their advantage and often neglect the fundamental rights of these often vulnerable women belonging to their religion. It is a temptation that the Indian judiciary has not always been able to resist. However, the Bombay High Court verdict in the Haji Ali case is an example of a judgment that adroitly negotiates these problematic issues by hewing closely

[48]Ibid.
[49]Air India v. Nargesh Meerza, 1981 AIR 1829 (India).
[50]Kalpana Kannabiran, Tools of Justice: Non-discrimination and the Indian Constitution, 35-36 (Routledge 2012).
[51]Gautam Bhatia, *supra* note 10.

to the Constitution, law, and the judicial task of defending individual rights[52]. For that, the Bombay High Court must be praised and its judgment upheld. The recent *Triple Talaq case*[53] is another example of how some of the essential practices of religions that can be derogatory to the dignity and conscience of women have been compromised in the past, therefore, meriting a severe and pragmatic approach for an optimistic future providing for inclusive development of all and not just the men.[54]

In this background, the Constitutional provisions try to remedy the adverse effects of the inequitable state of affairs. The scope for the substantial model of equality is thus a necessary requisite, as scholars point out.[55]Like the US Constitution, the Indian Constitution provides for preventing discrimination with respect to the right to vote.[56] In *Government of Andhra Pradesh v. Vijayakumar*[57], the Apex Court categorically held affirmative action for women in the field of public employment. As observed, this goes against the spirit of (substantive) equality and considerably shrinks the space for entitlements of persons from vulnerable groups.[58] It is not as much a question of equality between institutions inter se that is critical in access to education and the measure of equality between citizens differently placed because citizens bear the brunt of discrimination and exclusion. After all, reservation is an inseparable part of the principle of equality, and where equality is concerned, no institution can be outside its ambit.[59]

Concerning individual actions like sexual harassment at workplaces and institutions that arise in the absence of law or lack of adequate supervision by the employer, the Supreme Court has

[52]Gautam Bhatia, *The equality of entry*, THE HINDU, https://www.thehindu.com/opinion/lead/The-equality-of entry/article14626846.ece. (Last visited Apr. 10, 2021).
[53]Shayara Bano v. Union of India, WP (C) 118/2016; Samastha Kerala Jamiathul Ulema v. Union of India, WP (C) 994/2019 (India).
[54]Flavia Agnes, Shahbano to Kausar bano: Contextualizing the "Muslim woman" within a communalized polity in A. Loomba and R. A. Lukose (eds.) South Asian Feminism, 33-53 (Duke University Press 2012).
[55]Ratna Kapur and Brenda Cossman, *Subversive Sites: Feminist Engagements with Law in India*, (Thousand Oaks, CA, London & New Delhi: Sage 1996), Subversive Sites 20 years later Rethinking Feminist Engagements with Law.
[56]INDIA CONST. art. 325 provides that No person be ineligible for inclusion in or to claim to be included in a particular electoral roll on the grounds of religion, race, caste or sex. There shall be one general electoral roll for every territorial constituency for election to either House of Parliament, or either House of the Legislature of a State and no person shall be ineligible for inclusion in any such roll or claim to be included in any special electoral roll for any such constituency on grounds only of religion, race, caste, sex or any of them.
[57]1995 AIR 1648, 1995 SCC (4) 520 (India).
[58]Kalpana Kannabiran, *'Road Map for Reservation in Higher Education'*, THE HINDU, https://www.thehindu.com/todays-paper/tp-opinion/Road-map-for-reservation-in-higher education/article15205639.ece. (last visited Apr. 10, 2021).
[59]Ibid.

framed stringent guidelines in *Vishaka v. the State of Rajasthan*.[60]The court acquired a feminist vision as an input for its reasoning from international law source like Convention on Elimination of All Forms of Discrimination against Women (CEDAW) and constitutionally mandated Directive Principles of State Policy and affirmative action policy under Article 15(3) along with the idea of human dignity. Because of this vision, the extraordinary type of judicial law-making, in this case, became non-controversial and acceptable. The purposive construction of the Right to Life jurisprudence and the Dominance analysis of legislative silence were the tools incorporated for this process. The continuity of the Vishaka reasoning in *Apparel Export Promotion Council*[61] with further clarifications and the legislative efforts to concretise Vishaka guidelines vindicates the defensibility of such an approach.

Constitutional feminism requires an atypical approach towards the law relating to prostitution, rape, dowry-related crimes etc. For example, while expressing the law relating to rape, the Supreme Court in the *Bodhisattwa Gautam*[62] case moved with a dominance analysis. Thus, 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 with whom they, fortunately, under the Constitution enjoy equal status.[63] However, in the absence of a substantive equality approach in the judicial interpretation of Article 15 (3), there is scant consideration of whether the laws actually 'protect' women or create 'protectionist' measures to safeguard the honor and chastity of 'good' women.[64]

[60]Vishaka v. State of Rajasthan, AIR 1997 SC 3011 (India).
[61]Apparel Export Promotion Council v. A.K. Chopra, AIR 1999 SC 625 (India).
[62]Shri Bodhisattwa Gautam v. Subhra Chakraborty, 1996 AIR 922 (India).
[63]Dr. P Ishwara Bhat, *Constitutional Feminism- An Overview*, (2001) 2 SCC (Jour) 1, http://www.supremecourtcases.com/index2.php?option=com_content&itemid=54&do_pdf=1&id=945. (last visited Apr.10, 2021).
[64]Kalpana Kannabiran, "Articles 1-5: Non-Discrimination, Human Rights, Fundamental Freedoms, Special Measures and Elimination of Discriminatory Cultural Practices." 4th AND 5th NGO ALTERNATIVE REPORT ON CEDAW INDIA (last visited Apr. 10, 2021).

CHAPTER III

III. RIGHT TO EQUALITY W.R.T WOMEN IN U.S.

"Human Rights are Women's Rights and Women's Rights are Human Rights"[65]

- *Hillary Clinton.*

The fourteenth amendment incorporated two wartime goals: Equality and liberty. By its provisions, the amendment served as an express prohibition upon the states, and its mandate was an equalizing one in some incipient sense. Even though the word "equal" had featured in the Constitution before, this amendment scored the first time equality appeared in an aspirational sense. Thus, with the fourteenth amendment, liberty and equality, the two cornerstones of the U.S. constitutional system, were in position, and securely so, because each exhibited the formative conflicts of the national experience. Despite significant socioeconomic transformations that have dramatically changed women's lives in developed countries, cultural attitudes (especially involving women's work) and legal precedents still reinforce sexual inequalities. Bill of Rights for Women found accord on six propositions imperative to securing women's equality: implementing laws banning discrimination in employment; maternity rights; child-care centers for working mothers; tax deductions for child-care costs; equal education; and equal job-training opportunities for poor women. Political participation and leadership of women have flagged the way for many significant gender equality and justice reforms. Two other demands have stirred immense controversy in the past: demand for prompt adoption of the Equal Rights Amendment (ERA) to ensure equality of rights, regardless of sex. The other asked for greater access to contraception and abortion. Women's biological ability to conceive and bear children, a characteristic shared by almost all women, is the basis upon which many jurists and a massive part of society have concluded that a woman's primary traditional role in society is that of a caregiver[66]. From this biological determinism, attitudes and stereotypes that preclude women from equal treatment in the community have sprung. It forms the basis of the nature theory. Society has nurtured and maintained these sex characterization stereotypes.

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[65]Transcript: Hear Hillary Clinton's..MFA, https://www.mfa.org/exhibitions/amalia-pica/transcript-womens-rights-are-human-rights (last visited Sep. 26, 2021).
[66]Brooks v. Canada Safeway Ltd., [1989] 1 S.C.R. 1219, 1243 (1989) (Can).

III.I The Nascent Separate sphere approach

Upon this theory, many political theorists and even courts continue to support the denial of full social justice to women.[67] In this chapter, the researcher enquires about the nascent approach that the U.S. Apex Court developed after adopting the Fourteenth amendment. This nascent approach of the Court was characterized by the protectionist regime in which the jurisprudence evolved. This approach was categorically on the separate sphere or the benevolent protector regime, which seeks to differentiate solely based on natural differences between men and women.[68] This type of approach fails short of futuristic strategy to empower women in its true spirit and at best is myopic and regressive given the rationale of natural differences, which does more harm than empowerment or equalizing principle. The theory of separate sphere has plagued the jurisprudence on equality concerning women for long and has proved to impede developing progressive jurisprudence.[69] The Court's approach on these lines in its embryonic stage of jurisprudence on equality for women certainly took the role of benevolent protector rather than an equalizing principle.

Unlike the Indian Constitution, there is no explicit guarantee of equality in the Constitution of the U.S. However, in the Nineteenth Amendment[70], it is expressly provided that sex is no basis in realising the right to vote and therefore cannot be aggrieved on its grounds. The Fourteenth Amendment is the genesis of the guarantee of equality in the U.S. Constitution, providing equal protection of the laws.[71] The Constitution's approach has its root firmly rooted in the theory of formal equality; however, the separate sphere theory developed on the lines of natural differences paints a rather grim picture. The reading of the Constitutional text could be touted as advocating the formal theory of equality precisely because of the lack of any positive grant of system, i.e. the substantial theory of equality in the Constitution's text. Therefore, the approach of the Supreme Court has been in stark contrast with the approach of the Supreme

[67]Donna M. Eansor, To Bespeak the Obvious: A Substantive Equality Analysis of Reproduction and Equal Employment, 6 Notre Dame (J.L. Ethics & Pub. 417 1992). https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1480&context=ndjlepp. (last visited Apr. 18, 2021).
[68]Kathleen M. Sullivan, Constitutionalizing Women's Equality, 90 Cal. L. Rev. 735 (2002) http://scholarship.law.berkeley.edu/californialawreview/vol90/iss3/3 (last visited Apr. 18, 2021).
[69]Ibid.
[70]Nineteenth Amendment was ratified in 1920.
[71]Martha Craig Daughtrey, Women and the Constitution: Where We Are at the End of the Century, 75 N.Y.U. L. REv. 1, 4 (2000) https://www.nyulawreview.org/issues/volume-75-number-1/women-and-the-constitution-where-we-are-at-the-end-of-the-century/ (last visited Apr. 19, 2021).

Court of India, which is discussed in the subsequent chapter. Further, in this chapter, the researcher tries to evaluate the jurisprudence to understand the approach of the U.S. Supreme Court in handling equality issues pertaining to women.

The theory of formal equality means that people should be treated equally irrespective of any qualification or background, which implies that people who may be in a different situation cannot be treated differently. However, the nascent approach imparted substantive content to its interpretation, clearly evident in the application of separate spheres and the protectionist regime the approach essentially advocates. Ideally, courts in applying formal theory are not to acknowledge the differences; however, in the subsequent paragraphs, it points out how the U.S Apex Court has imparted substantive content to its interpretation on equality issues. This departure from the formal theory of equality is indeed ironic given what the Constitutional text offers. So it is evident that even in applying the formal theory of equality, the differences could be acknowledged, therefore making way for the substantial approach. However, the Fourteenth Amendment indeed became a potent tool for the Court to further the interests of women. The amendment enabled the Court to upheld gender classifications. It also laid the basis for laws for women and rejected theories that categorically shunned the idea of any differences between the two genders and underlying assumptions of nature. The Court, in its judgments, would acknowledge the delicate nature of women with the relevant biological differences which determined the gender dynamics.[72] However, the protectionist mind-set could be subject to severe criticism from present-day feminists. They categorically reject the idea of men as protectors and even by the yardstick of progressive jurisprudence. Since the Court, in justifying the differences, often relegated women to being protected by men and often strengthened the stereotype gender roles constructed by society, it raises some severe objections by academia.

For example in *Hoyt v. Florida*[73] supported the exemption for women serving as jurors. Such judgments categorically advocate the stereotyping of gender roles. In fact, such points in jurisprudence have further imparted judicial authority to the already regressive notion of gender roles practised by society, thereby further increasing the gap between men and women by emphasizing what they are meant to do and not what they could do or should do. Therefore this

[72]See Hoyt v. Florida, 368 U.S. 57 (1961) (supporting exemption for women serving as jurors); Goesaert v. Cleary, 335 U.S. 464 (1948) (sanctioning limitation on women serving as bartenders); Bradwell v. Illinois, 83 U.S. 130 (1872); upholding a ban on women practising law.
[73]368 U.S. 57 (1961).

further reinforces the regressive notion of society which the Court is supposed to remedy and certainly puts such an approach on a new low altogether in the jurisprudence on women equality.

The Court has validated the legal protection of women in the so-called pursuit of the physical and moral well-being of women. *Bradwell V. Illinois*[74] illustrated the approach of the Court in which the Court had upheld the ban on women practising law imposed by the state of Illinois. Again, this case is an apt example of the gender role theory of a separate sphere categorically stressed upon in acknowledging the relevant differences between men and women in the gender equation. So the notion of equality in the early interpretation limited the roles of women to certain occupations. As Bradwell illustrates, this was the approach adopted by the Court regarding equality issues concerned with women. So the judgments not essential empowered women instead pushed them towards concretization of gender roles.

In *Muller v. Oregon*[75], the Court upheld the statute's validity that categorically prohibited women's employment in a laundry or a factory for more than ten hours per day. Therefore it is evident from these decisions that the Court relied on the notion of the weak physical nature of women and other biological considerations like the child-rearing nature of women in arriving at a conclusion in interpreting equality provisions of the Constitution. This approach certainly is not what any jurisdiction aspires to, given the already grim prevalent gender dynamics in society. This difference is based on biological differences acknowledged by the Court in a series of decisions that led to the validation of special legislation made for women premised on women's physical and maternal nature. It severely hampers the scope for progressive foundations on equality concerning women and the need for an anti-stereotyping principle. It is important to note that in other cases as well, this benevolent preference was given to women, thus making it clear the approach to be adopted in such cases.

In *Goesaert*[76], the Court upheld the validity of a Michigan law that was premised on a similar line of reasoning. The law of Michigan prohibited women from working in the capacity of a bartender unless the owner was a father or a husband. The judgment was rooted in the underlying assumption of protecting the physical and moral well-being of the women. Given

[74] 83 U.S. 130 (1872).
[75] 208 U.S. 412 (1908).
[76] *supra* note 72.

that bars could be a dangerous workplace for women to work in, it was a valid prohibition given the delicate nature of women. Therefore these judgments were woven throughout with the principles of *"men the protector and women as the protected",* this could well be the bottom-line rationale of such decisions. The only test of such classifications was that it should bear a rational relationship with the government's objective. The decision in the *Goesaert* makes it clear that while equality offered by the Constitution precluded any discrimination between men and women, the text of the Constitution certainly provides for that where the persons are not in the same situation, there could be well-grounded reasons based on which classification could be made.[77]These well-grounded reasons should be sufficient to reflect the relevant differences.

The decisions discussed above primarily relied on the physical nature of women to address the validity of such laws regarding the equality of women. In the 1960s, in another decision[78], the Court upheld the differential treatment of men and women concerning jury service. In this particular decision, the Court mandated service by men while permitting services by women. So it is evident that after the adoption of the Fourteenth Amendment in 1920, the Court has had in series of judgments upheld such gender classifications as discussed above with respect to the equality clause embedded in the Constitutional text. However, the interpretation of this very equality clause suffered the onslaught of the narrow prism of separate sphere theory. As a result, all the laws that treated men and women differently in the background of the formal theory of equality that the Constitutional text offered were held to be valid because they were not on equal footing, thus providing room for treating differently. All of it could be done without contravention of the Equality Clause of the Constitution, which required them to be treated on the same pedestal. But the underlying assumption regarding the inherent difference in the physical nature of women paved room for interpretation to make a classification favouring women despite the Constitutional text providing for the formal theory of equality. Thus, the jurisprudence was well-settled post-Fourteenth Amendment, which considered the social forces affecting the gender equation between men and women. The ban on working of women in bars or to practice law demonstrates this approach of the Court with respect to equality issues.

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[77]Mary Anne C. Case, Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence, 105 YALE Law Journal 1, 10 (1995) https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=7641&context=ylj (last visited 20th Apr. 20, 2021).

[78]*supra* note 72.

In hindsight, it is essential to note that these underlying principles could well be subjected to feminist theories of the 20th century, which despised the gender roles created by society and such decisions in particular, which only consolidated the stereotypes.[79]Whether the validation of classification reinforced the idea or notion of equality in its true essence and spirit could be a question of another academic research. Therefore, it could be argued that the theory of formal equality in the sense of the term became redundant in this context and the court in acknowledging the relevant differences between men and women primarily aimed at the protectionist regime.[80]

However, in another landmark judgment in *Reed v. Reed*[81], the Court departed from its early approach. In this case, the Bench departed from what could be the two-pronged approach with respect to equal protection: the test of strict scrutiny and test of rational basis. In the context of strict scrutiny, it involved an analysis of denial of fundamentals in cases involving national origin or race as the case may be and to satisfy the requirements of the strict scrutiny; it was essential to show nexus between the interest of the government and the classification made on such basis. Therefore the question of what is rational basis had to be demonstrated to satisfy the Constitutional requirement of equality. The facts of the case show the reason why Reed is relevant in this context. In the instant case, the Idaho statute mandated a preferential basis to men concerning the management and administration of the estates. As a result, the men were given preference over women when certain appointments were made in the same class. Further, in the case, Reed had committed suicide, and his parents were battling it out to administer the estate. Given the statute, the father of Reed was given preference over his mother. But in somewhat a departure from the early approach adopted by the Courts, the Court held the statute to be inconsistent with the equality provisions, therefore, departing from its status quo approach of upholding such gender-based classifications. The Court relied on the *rational basis test*, which required the classification to have a reasonable nexus with a legitimate purpose of the government. However, the Court found the classification to be devoid of any reasonable nexus to the state objective and thus sex classification to be arbitrary. It hinted in its judgment that

[79]Tabby Biddle, Women Don't Have Equal Rights in the United States, https://www.huffingtonpost.com/tabby-biddle/wait-women-dont-have-equa_b_6098120.html (last visited Apr. 20, 2021).
[80]OHCHR, "Women facing multiple forms of discrimination", 2009, www.un.org/en/durbanreview2009/pdf/InfoNote_07_Women_and_ Discrimination_En.pdf (last visited Apr. 20, 2021).
[81]404 U.S. 71 (1971).

gender could not substitute competence. Such classification is therefore arbitrary in the eyes of the Court. Thus, Reed marked a departure from the early approach of the Court and raised the level of scrutiny to ascertain whether such classification could be arbitrary or serve as a proxy for any competency-based work.[82] Thus, a theory of formal equality, which requires treating equals alike and the threshold of making any classification based on sex, was raised as evident.

Interestingly in another judgment, the Court again applied the *test of strict scrutiny* to check the validation of similar classification meant for men and women. The challenge was brought under the Fifth Amendment of the Constitution. In this case, the medical and housing benefits were provided to the wives of service members and not the other way around, thus demanding scrutiny of equality. As a result, the test of strict scrutiny was applied. The justification for the same was that sex also happens to be a part of suspect classification given the grim pervasive history of women and ultimately due to the very nature of sex as being immutable. Also, given the history of race and religion, it could be treated as a suspect classification. All of this pointed out that the approach had taken a high-ended approach involving stricter scrutiny to validate such a classification. Parts of the Civil Rights Act of 1960 and the Equal Pay Act of 1963 point out that sex discrimination is prevalent in society, requiring raising the threshold if such classification is scrutinized. The Court categorically rejected administrative convenience to be the reason for such sex-based classification. The Court carried forward the nuanced scrutiny of the Reed to check any such classification based on administrative convenience and which treated the two genders differently despite them being in the same situation, which in turn defies the very essence of the Equality Clause which the text of the Constitution offers.[83]These two decisions consolidated the position of sex being treated as a suspect classification, thus marking an essential point in the jurisprudence on the right to equality with respect to women. Therefore, these decisions clarified that administrative convenience could not serve as a proxy for competence and legitimate justification for sex classification. The arbitrary nature of such classifications was against the spirit of the Equality clause in the Constitution. Further, as illustrated above, the fact that such sex classifications treated them differently despite being in the same situation indeed turned out to be arbitrary, and the judicial interpretation certainly plugged the holes here. The judicial decisions in *Reed* and *Frontiero* ensured that legislative

[82]Shayara Bano v. Union of India 2017 9 SCC 1 (India).
[83]See, e.g., Johnson v. California, 543 U.S. 499 (2005) (finding that strict scrutiny is the proper standard of review for a racial segregation claim); Grutter v. Bollinger, 539 U.S. 306 (2003) (holding that racial classification must survive strict scrutiny).

pieces could not be arbitrary on the pretext of sex-based classification, which can undermine the clause of the similar footing test that like be treated alike and unlike be treated unlike. This underlying principle is violated when legislative pieces blindly violate the essence of equality and thus fail the strict scrutiny test. Else the Due Process Clause of the Fifth Amendment would merely be a showpiece serving no utility in the Constitution. Therefore this nascent approach adopted by the Court is characterized by the distinctive approach adopted by the Court concerning men and women, more specifically based on natural differences. This certainly is not in line with what the constitutional text offers: the formal equality model.

The essence of the formal equality model is not to differentiate. At the same time, the courts have conveniently made a distinction in applying the principle of equality with respect to women, albeit on the notion of sex alone.[84]The mere acknowledgement of natural and biological differences points to the futile application of the formalistic theory of equality in its interpretation.[85]The substantive interpretation makes such acknowledgement but not the basis of natural differences alone but the discrimination arising from such differences and distinction. Further, the separate sphere approach, which such interpretation further consolidates by imparting judicial authority to the so-called gender rules, defeats the essence of the very notion of equality.

[84]*Supra* note 72.
[85]Ibid.

III.II The Intermediary test

So it was visible from these decisions, which tried to depart from the early approach where the scrutiny was at ease with respect to sex-based classifications. The Court had heightened the scrutiny and checked sex-based classifications in the suspect class and even diluted its protectionist mind-set, which was just based on explicit sex and indifferent to the situation and competency. Following the trend, the Court further, in another landmark decision[86], invalidated a statute of Utah that discriminated between sons and daughters. The Court followed the standards laid down in Reed and held the classification unjustified against the standard set in Reed, again consolidating the new stance compared to the traditional gender role specific protectionist stance, which the Court took in its early decision post the adoption of the Fourteenth Amendment. The Court categorically rejected the gender roles advocated by the earlier decisions in this particular case. Such a traditional view of gender was held to be narrow and arbitrary regarding the Equality Clause in the Constitution. It acknowledges that the old practices of the past cannot determine the gender roles as they are expanding and women have successfully charted into new work areas. However, in a subsequent case in *Craig v. Boren*[87], the majority of the Court held that intermediate-level scrutiny should be the test of such classifications whether they satisfy the requirements of the Equal Protection Clause under the Constitution. Such classifications based on sex should fundamentally serve the government's objectives and have a nexus with them to hold them good against the equality principle of the Constitution. This intermediary test is thus the governing test whenever sex classifications are challenged under the Equal Protection Clause. Classifications as per gender must serve important governmental objectives and must be substantially related to achieving those objectives. This case challenges the traditional notions of gender roles that only stereotype what a particular gender does without considering the competence part.[88] The early decisions were driven by such a narrow outlook fitting into the stereotype gender roles constructed by society.

This decision broadened the scope of scrutiny with more fundamental conceptions prevalent in society as just the protectionist regime based on physical nature would negate the spirit of equality principles in the Constitution and be hypocritical at the same time. Therefore one could

[86]Stanton v. Stanton 421 U.S. 7 (1975).
[87]429 U.S. 190 (1976).
[88]Catharine A. MacKinnon, Substantive Equality: A Perspective, 96 Minn. L. Rev. 1 (2011), https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1382&context=mlr. (last visited May 1, 2021).

probably argue that these decisions, which made the scrutiny more challenging by acknowledging the limited utility of gender roles, paved the way for future jurisprudence of which remnants we see today. Perhaps the judges had the vision to re-look the gender roles given the changes happening in the society. Therefore judicial decisions should respond to these very societal changes and thus embark upon a new approach when equality issues are raised before the Court in particular with respect to women.[89] Craig as a decision could be hailed for future progressive judgments that had to come. The decision in Craig was a reminder of the ethos of the society, which fundamentally screwed up the gender equation in the name of equality in its narrow approach of protectionist mind-set with gender roles playing the norms. As a result, post the decision in Craig, the Court has invalidated many legislations based on sex classification based on intermediary scrutiny.

These judgments, in essence, defied the traditional notions of gender roles and failed to appreciate the early decisions which hailed men as the protector. This certainly helped to embark upon a robust jurisprudence in women's empowerment and putting them on equal footing with men in similar situations. The earlier decisions could have failed to acknowledge a broad perspective on gender dynamics concerning women. As a result, women had to suffer social consequences of these legal rendered decisions, which defied the spirit and essence of the equality principle of the Constitution. The effect of the Court's decision in Craig has affected the future decisions to come. In the coming years following the same approach, the Court invalidated many statute pieces which were based on gender classification. The same approach was reinforced in another decision, in *Kirchberg v. Feenstra*[90], where women were not entitled to administer jointly owned property unless the husband had died. This, in turn, gave men undue advantage to manage the property just based on sex and not any competence whatsoever. This certainly had to fail the tightened scrutiny of the Court with respect to gender-based classifications. Therefore the decision invalidated the law again premised on the basis of gender classification. The change in the Court's approach certainly impacted how the equality issues were to be interpreted. It was because of this reason precisely that the Court had invalidated many of the laws based on gender classification in the cases to come as the above-discussed case highlighted. It also showed signs of a broader outlook against the outdated notion of gender roles backed by judicial decisions. So only a few laws could survive the

[89]Ibid.
[90]Kirchberg v. Feenstra 450 U.S. 455 (1981).

scrutiny of the Court against the renewed approach. In another case, namely, *Orr v. Orr*[91], the Court categorically struck down a law that only allowed alimony to women and not men, thus denying the principle of equality and failing the scrutiny test.

Another case of *Mississippi University for Women v. Hogan*[92], with a similar line of reasoning held a law to be contrary to the Constitution, which had expressly excluded enrolment of men in nursing schools. This reflects that the men also got their due as a result of this approach, as earlier, they were only confined to fit into a particular gender role. The result was that a handful of such laws could be validated. An apt example could be a case where the law related to sexual offences only punished the male.[93] Similarly, some other laws in their context were upheld by the Court where it felt the gender classification to be justified[94]. Nevertheless, these cases were in the minority post the decision in Craig and certainly marked a new approach in the jurisprudence on an equality with respect to women. In another decision[95], the provisions of the Social Security Act were held to be valid even though it was based on gender-based classification. Thus one thing was clear that the laws had to pass a much tougher test to accommodate the gender-based classification as a premise for excluding the other gender. However, the Court did uphold the classification as illustrated in the few decisions quoted above. The same could be demonstrated through the decision in *Michael M v. Superior Court of Sonoma County*[96]; the Court upheld rape laws of the state of California which only provided conviction of men and not women. The Court premised its justification on the purpose of the government to prevent teenage pregnancy, which was at growth and created societal problems. Thus given the nexus between the government's objective and the law, the law was held to be valid by the Court. Such laws can also be seen in India, such as the law on adultery which only punished men and not women and has been constitutionally held to be valid.

Further, it is seen that in the *Webster case*[97], the Court upheld the legislation which provided for compensation to women due to past discriminatory practices. Here the grim history of women's discrimination played a determinant factor in keeping the validity of the law as it was

[91]U.S. 268 (1979).
[92]458 U.S. 718 (1982).
[93]Michael M. v. Superior Court of Sonoma, 450 U.S. 464 (1981).
[94]For example, in Rostker v. Goldberg, 453 U.S. 57 (1981), the Court only mandated the selection of men in the Military services to the exclusion of women.
[95]430 U.S. 313 (1977).
[96]*supra* note 88.
[97]430 U.S. 313 (1977).

acknowledged by the Court the grim history where the women were severely discriminated against and paid less compared to men for the same amount of work. Therefore the objective was clear and in nexus with the law, thus satisfying the Constitutional requirement and the test of scrutiny despite being of a higher threshold. Therefore it survived the mid-level scrutiny test and further paved the way for similar legislation in the country, however, subjected to the intermediary test of scrutiny. It is, however, to be noted that all such decisions which were though in the minority took into consideration the contextual background to justify the scrutiny test and not merely rely on the plain distinction of sex. The adverse and exceptional circumstances were accounted for in concluding such decisions. Thus it could be argued that the history and the discriminatory factors prevalent in the society were the driving factors in upholding such legislative pieces. Therefore if some societal factors made the situation such that men and women could not be treated on equal footing, then the Court did adopt an approach pragmatic in nature to give the necessary fuel to the notion of equality in the country otherwise which would have had the potential to destroy some basic tenets of equality enshrined in the Constitution. Therefore the application of substantive equality is essential to remedy the substantive inequalities concerning women. The role of substantive equality here is to acknowledge the societal background of discrimination and not just on the basis of sex alone. It becomes more critical to reproductive rights and employment opportunities as discrimination arises based on pregnancy, childbirth, and related medical conditions.

The Court's approach in *Guerra*[98] is of significance because of its importance to the substantive model of equality. Guerra certainly is progressive because it has acknowledged discriminations stemming from reproduction and other medical conditions associated with it, which in turn hamper the equal opportunities at employment. Thus, substantive interpretation gains importance in this scenario as formal theory fails to address this issue, as evident from the preceding paragraphs. Similarly, in Guerra, the Court's understanding of the legislation Pregnancy Discrimination Act (PDA) of 1978 from a substantive equality perspective is a significant step towards developing a substantive equality framework in which cases in the United States about reproduction and equal employment can be analysed. However, despite Guerra, United States courts continued to rely heavily on a formal equality analysis and their decisions remained influenced by the nature theory. The appellate decision in Johnson

[98]California Federal Savings v. Guerra 479 U.S. 272 (1987).

Controls is an example of this. Among the many reasons, the Supreme Court decision in *Johnson Controls*[99] is the most crucial sex-discrimination case in any court since 1964.

Further, the decision of the Court in *Griggs v. Duke Power Co*.[100] relevant in applying the disparate impact theory since it is a fact that pregnancy indeed has a distinct impact on women. In that sense, a gender-neutral policy would the PDA. Therefore judgment premised on such a line of reasoning would undoubtedly widen the contours of discrimination- more so, systemic discrimination is significant given the application of disparate impact theory. The Court could have applied the disparate impact theory in *Griggs* to the gender-neutral disability policy issue. Because pregnancy has a disparate impact on women, a neutral policy would be sex discrimination and violate the PDA. This finding by the Court would have broadened the definition of discrimination to include systemic discrimination. The courts in *Jackson v. Birmingham Board of Education*[101] held that Title IX prohibits discrimination based on sex and intrinsically outlaws disciplining someone for charging about sex-based discrimination. It further adopted the view that it is the case even when the person complaining is not amongst those being victimised.

[99]United Automobile Workers v. Johnson Controls Inc. 499 U.S. 187.
[100]410 U.S. 424 (1971).
[101]544 U.S. 167 (2005).

CHAPTER IV

IV. JUDICIAL INTERPRETATION: PLUGGING OR WIDENING THE GAPS?

IV.I Indian Scenario

The Formal equality theory has been utilised to maintain classifications dependent on significant socially developed contrasts between men and women. A significant number of these cases address basic protectionism, uncovering the underlying patriarchal standards that prohibit ladies from the work environment and civic responsibility. The Indian Supreme Court's treatment of equality claims is more multifaceted, mirroring the Constitution's obligation to utilise protective discrimination to accomplish equality. The provisions under Article 15(3) of the Indian constitution are conceived to give the structure of protective discrimination in a departure from the idea of the conventional theory of formal equality, which prove to be moribund and redundant in the background of the unique patriarchal setup of the Indian society.[102]The Constitutional philosophy embedded in Article 15(3) reflects that affirmative steps are *non qua sin* to remove the inherent inequitable nature of the opportunities presented to the women.[103]The judicial decisions, therefore, should fill the void of equality.

The approach of the apex court is thus critical. Still, whether the judiciary has done enough on the equality issues confronting women is a pertinent question. The skewed nature of equality of opportunities before women is well documented. The preceding paragraphs, which highlight the judiciary's protectionist attitude, is not optimistic. It thus raises the question of whether the judiciary is doing a fair job in plugging the gaps. For this very reason, Article 15(3) treats women as a class and intends to negate the notion of absolute equality in what can be termed a progressive step towards the protection of the rights of women. Further, as discussed in the preceding paragraphs, Article 15(1) and 16(1) empowers the state to take steps in this direction to negate the unjust past and provide them equal opportunities in the social, economic and

[102]Archana Parashar, Women and Family Law in India: Uniform Civil Code and Gender Equality. (Thousand Oaks, CA, London and New Delhi: Sage 1992).
[103]Indira Jaising, Supreme But Not Infallible: Essays In Honour Of The Supreme Court Of India 288, 306–309 (2000).

political setup, thereby liberating women from the primitive bond of patriarchal mind-set. , the interpretation of the judiciary thus becomes essential in this context given the share of regressive judgments in the extension of the orthodox notions of gender roles.

The constitutional framers were clear that formal equality will fail to bring women on par with men and move in an idealistic direction; it was imperative to provide for provisions substantive in nature and provide for positive discrimination and affirm the rights of the vulnerable. It is evident that Article 15(3) has become the genesis for a protectionist approach that can be safely concluded on perusing the Supreme Court's decisions.[104] Consequently, the judgments uphold affirmative action policies that the government undertakes to provide reservations to women, thereby signalling the adoption of a substantial notion of equality not just in theory but in practice.[105] It is these authorisations that give way for substantive equality and the notion of protective discrimination. In this specific background, the Supreme Court has upheld the reservation of seats in the municipalities and even in the government offices and co-operative societies, to mention a few. These decisions point out that protective discrimination is a means to achieve equality and not an exception in any sense. As discussed in the preceding paragraphs, *Government of Andhra Pradesh v. Vijaya Kumar*, the Court upheld the reservation of jobs in the public sphere, thus adopting the substantive equality model emphasising Article 15 (3) and its inter-link with other articles of the Constitution. The Court, in this case, emphasised Article 15(3), defining it to be the remedy of the historical past full of inequitable contradictions. Thus Article 15(3) is seen as a means to achieve equality in its essence rather than departing from the notion of equality of opportunity. Without equal setting for all, there cannot be any equitable opportunity. Fundamental to these decisions is the fact that the text of the Indian Constitution proves to be a boon in amelioration of subjugation of women. Perhaps, for this reason, the texture of Article 15 is such that it acknowledges that 'sex' itself has pushed the gender female into subordination, thus defying the very tenets of constitutional equality.

India's constitutional text holds excellent potential for ameliorating the subordination of women to men. Therefore the Constitutional jurisprudence on the issue fully supports a substantive model rooted in Article 15(3) read in conjunction with other articles as any other

[104]E. P. Royappa v. State of Tamil Nadu, A.I.R. 1974 S.C. 555 (strict nexus test abandoned in favour of broader arbitrariness test to determine discriminatory classifications under article 14); Shri Ram Krishna Dalmia v. Shri Justice S. R. Tendolkar, (1959) S.C.R. 279 (classifications valid for purposes of article 14) (India).
[105]Ibid.

approach would not suffice to provide the requisite needs of the notion of equality in its essence. It is thus imperative that such provisions are interpreted broadly and liberally to realize the full potential.[106]Therefore in this context, it can be safely concluded going by the judicial interpretation that Article 15(3) is integral to provisions of reservation, and it does not contradict Article 16. Further in *Vijaya Kumar*[107], the Court emphasized the point that reservation is indeed the constitutionally recognized tool to remedy the backwardness which has been a result of inequitable opportunities, therefore making a reservation under Article 15(3) a valid and constitutionally legitimate approach to achieve the notion of equality in its true sense. Despite categorical recognition of Article 15 as a tool for consolidating equality, the Court's role in pronouncing rather myopic judgments had instead widened the gap. No wonder the constitutional forefathers had in mind the state of affairs concerning women who were subject to severe discrimination just based on sex and further subjected to a limited choice of freedom and conscience, which is present to this day[108]. Thus, making it imperative on the guardian of the Constitution to interpret accordingly to serve the ideals of justice and equality.

Therefore, affirmative action is one of the effective solutions in the context of the historical past, which has been unjust and inequitable to the disadvantage of the women and imperative on the part of the judiciary to pronounce judgments beyond protectionist regime. The gamut of these articles has proven to be a sword in the judiciary's hands, which has interpreted these provisions favouring women over men and interpreting other laws keeping in mind these fundamental principles underlying these provisions.[109]The rendition of Section 125 of the Criminal Procedure Code is another apt example. The Apex Court looked into the issue from the perspective of women and interpreted the section to provide maintenance to the wives.[110] The reasoning given by the Court in such a case is generally premised on the idea of inclusive justice through affirmative action embedded in Article 15(3) read with the aid of Article 39 to reinforce the notion of equality in its true sense. The constitutional empathy embodied in its philosophy is evident in such interpretations where the Court has taken the liberal approach to acknowledge the weaker sections and, in particular, the women. This indeed

[106]Pannalal Bansilal Pitti v. State of A.P., (1996) 2 S.C.C. 498, 510 (India).
[107]AIR1995 SC1648 (India).
[108]The need for Supreme Court's stance in the *Kush Kalra* Petition allowing women to take admission exam to National Defense Academy (NDA) for 2021 attempt makes it evident for the role of courts in upholding women's basic right to equality.
[109]Flavia Agnes, Muslim Women's Rights and Media Coverage 15 (EPW 22 2016), ISSN (Online) - 2349-8846 (last visited Jun. 12, 2021).
[110]Mohd. Ahmed Khan v. Shah Bano Begum 1985 SCR (3) 844.

is progressive given the due rights of women whose legitimate rights took a seat back in the chaos of patriarchal society. Thus, reinforcing the notions of equality concerning women has to empathize with certain constitutional rigour that the courts have adopted in the interpretation of laws in the background of the provisions of the Constitution.

Another remarkable illustration is provided by the *Municipal Corporation of Delhi v. Female Workers*[111], where the Courts have adopted a similar approach to favour women. The Court, in its judgment, held that the temporary workers are also entitled to maternity benefits, and that name on the muster roll is enough to grant such maternity benefits. The Court also looked into the Preamble, which categorically provides for social and economic justice. On a similar line of reasoning, the Court has also interpreted the Hindu Succession Act, 1956 to the advantage of the women given the bias inherent in the Act towards men, thus denying women of its basic rights with respect to succession. The Court, although inconsistent, has occasionally interpreted personal laws where the interests of the women have been at stake, like in the Shah Bano case. On a cursory analysis of these cases, it could be argued that the Court has indeed adopted the approach of acknowledging the indifference of these personal laws with respect to women, which are essentially antithetical to the very conception of equality.[112]As a result, the Court has adopted a stricter approach, although not disturbing the essential practices of any religion as such, from time to time, it has used its power to rule in favour of the women. Further, it is in this context clear that such discrimination and disadvantages are against the underlying principles of Articles 14 and 15(3). In particular, Article 15(3) has proved to be Pandora's Box for the emancipation of women from the primitive bonds of patriarchy.

The Courts have also extensively relied on international conventions to provide the necessary interpretation of the municipal laws. For example, the Courts have interpreted The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) [113]to arrive at essential conclusions, which also include the famous *Vishakha v. State of Rajasthan*[114], where guidelines for sexual harassment at workplace have been laid down inspired by the CEDAW. In this background, it is essential to acknowledge that the Supreme Court has balanced the rights of the minority along with the women's rights, as minority rights are also explicitly

[111]AIR 2000 SC 1274 (India).
[112]Upendra Baxi, Future of Human rights, (Oxford University Press, New Delhi 2008).
[113]India ratified CEDAW in 1993.
[114](1997) 6 SCC 241 (India).

mentioned in the Constitution.[115] In cases involving questions over Muslim Personal law and balancing Muslim women's rights is one such area where the Court has adopted a liberal and a progressive approach where the rights of Muslim women were judicially protected. The recent triple talaq case is the most recent example in this context. The practise of triple talaq as given under the Section 3 of the Shariyat Act was held to be violative of Article 14. On further jurisprudential analysis, we further see that such interpretations were widespread in the earlier period, with the Court doing a fair job in recognizing and acknowledging women's basic rights. In another illustrative case, it was held by the Court that impotence could be ground for divorce.[116]Thus, it could be concluded that Article 15(1) prohibits gender-based discrimination and Article 15(3) softens the strictness of Article 15(1). It permits the State to positively discriminate in favour of women to make special provisions to improve their social condition and provide political, economic and social justice. The State and the Courts have resorted to Article 15(3) in Criminal Law, Labour Law, Service Law, and others to uphold the validity of protective provisions in favour of women under the Constitutional mandate. In a stretch of numerous cases, the Courts have upheld the validity of establishing educational institutions for the women-only, resulting in inviting petitions into the courts challenging such institutions meant exclusively for women. The Courts have affirmed such classification in this regard; in one such case in *Dattatraya v. State of Bombay*[117]**,** the two-judge bench of the Bombay High Court held such classification to be valid and held that State could establish educational institutions exclusively for women only.

The judiciary, therefore, has reinforced the theory of substantial model of equality to the issues on equality petitions. In another remarkable judgment[118], the Apex Court upheld Section 497 of the Indian Penal Code (IPC); the issue was premised on Articles 14 and 15(1) of the Constitution. The offence of adultery is provided under Section 497 of the IPC, which is gender-specific and criminalizes only the man participating in adultery and exempts the women. Prima facie, one could argue in the ordinary sense that it can be made to be violative of the principle of equality. However, the Courts have employed the theory of *substantive*

[115]Kimberley Crenshaw, Mapping the Margins: Intersectionality, Identity politics and violence against women of colour 43 Stanford Law Review 1299 (1991)
[116]Cases tending towards the recognition of 'irretrievable breakdown of marriage through the extension of the concept of cruelty as grounds for divorce within Hindu personal law (*Naveen Kohli v. Neelu Kohli*, AIR 2006 SC 1675), comprising even the denial of sexual intercourse (*Smt. Shashi Bala v. Shri Rajiv Arora*, 2012 (129) DRJ 678) (India), hint at the vagueness of what could be deemed 'reasonable' within Muslim personal law.
[117]AIR 1952 SC 181 (India).
[118]Yusuf Abdul Aziz v. State of Bombay AIR 1954 SC 321 (India).

equality and have justified such laws that are not gender-neutral. The court in this particular case held that the classification was not based just on sex. However, the positive grant of classification was premised on Article 15(3) even though the woman is equally involved in the offence of adultery and thus should in ordinary circumstances amount to abetment in the offence. Therefore, the mandate under Article 15(3) has been used as a sword for providing protectionism rights-regime for women to the extent of justifying gender-exclusionary laws.

The protectionist regime and positive grant of rights have been extended to provide reservations in jobs for women under the ambit of Article 15(3)[119]. So reservations exclusively for women can be provided using Article 15 as a shield. In such reservations premised on Article 15, Article 16 is not violated and is not a bar for providing reservations. The Courts have stressed the harmonious construction of articles 15 and 16 and not to interpret another to defeat the object of the other. Therefore there are no competing thoughts on whether reservations for women can be provided. The answer lies in the affirmative. However, the Supreme Court has laid few conditions for the same; therefore, it is not absolute. The Court in Indira Sawhney v. Union of India[120] categorically held that such reservations could not exceed 50%. Also, it emphasized that Article 15(3) should be given the broadest interpretation to serve the true objective of the provision as any departure from the same could further aggravate the inequitable equation in the gender dynamics. Feminists argue that such provisions are the backbone if women are to be brought on par with men. Therefore in this context, it could be concluded that there is settled jurisprudence which provides that Article 15(3) in an enabling provision which accords socio-economic equality to women as a measure to remedy the historical injustice meted out to this gender and thus the burden of Article 15(1) cease to be a burden. Article 15(3) thus relieves the state from the bondage of Article 15(1) and enables the state to make special provisions to accord socio-economic equality to women.[121]

Although discussed earlier, the *P.B. Vijaya Kumar*[122] case is vital given the case's peculiar facts. In the instant case legislation made by the State of Andhra Pradesh providing 30% reservation of seats for women in local bodies and educational institutions was held valid by the Supreme Court and also held that the power conferred upon the State under Article 15(3)

[119]M.P. Jain., in Indian Constitutional Law, 992 (2011).
[120]AIR 1992 SC 477 (India).
[121]Ibid.
[122]*supra* note 107.

is so comprehensive which would cover the powers to make the special legal provisions for women in respect of employment or education. This exclusive power is an integral part of Article 15(3) and does not override Article 16 of the Constitution. However, it is crucial to refer to decisions that adopted a different approach to cases involving equality issues with women in this context. In *Associate Banks Officers Association v. State Bank of India*[123], the Supreme Court held that it could not be concluded that women workers are in any way inferior to their male counterparts, therefore, extending the legal reasoning that sex alone could not be ground to pave for discrimination. Herein, the Apex Court held that women workers were not inferior to their male counterparts, and there should not be discrimination on the ground of sex against women. Such a decision is fundamentally premised on the *formal theory of equality*, which does not permit any such positive grant of a system based on sex. In a more recent judgment[124], the Apex Court has categorically held that Articles 15 and 16 read together prohibit any discriminatory treatment but does not stop from providing preferential or special treatment for the women, thereby reinforcing the positive grant theory. The theory of affirmative action is thus an inherent part of the Constitution and coming under part III only makes it a more potent tool in the hands of the Courts. In another *Vijay Lakshmi v. Punjab University*,[125] the rules of the University of Punjab provided for the appointment of a lady principle which was held not to be violative of Articles 14 or 16 of the Constitution because the classification therein is reasonable and has a nexus with the objective endeavoured to be achieved. In summation, the State Government is empowered to make such special provisions under Article 15(3) of the Constitution. This power is not restrained in any manner by Article 16. In this way, the Indian Judiciary has played a progressive role in preserving women's rights in society.

As mentioned above, the Courts have tried to protect Muslim women's rights from personal laws violating the fundamental rights of the women.[126] Nevertheless, there are yet miles to go before Courts can tread on the delicate balance between personal laws and women's equality given the absence of the *Uniform Civil Code*, which is a unit of the Directive Principles of State Policy under Article 44 of the Constitution. However, we have seen Apex Court interpreting laws to protect the rights of Muslim women to protect their legitimate rights in the past. The

[123]AIR 1998 SC 32 (India).
[124]Air India Cabin Crew Association v. Yeshaswinee Merchant AIR 2004 SC 187 (India).
[125]AIR 2003 SC 3331 (India).
[126]Geetangali Gangoli, Indian Feminisms: Law, Patriarchies and Violence in India (Routledge, 2016).

famous Shah Bano judgment is a testimony to this effort by the Supreme Court, where it interpreted the provision Section 125 of the Cr. P.C to protect the rights of Muslim women.
In 2001 in another landmark case *Latifi v. Union of India*[127], the Apex Court confronted with the Muslim Women Act,1986 stated that Muslim women should not be put to disadvantageous position with respect to women of other religions when personal laws are questioned in the Court based on equality provisions of the Constitution. According to the Court, putting Muslim women in a less advantageous position would violate the constitutional mandate of equality, thus reaffirming the progressive stance of the Court towards equality issues Vis a Vis, the personal laws. The Court has often found itself in troubling waters when balancing the competing interests of religious autonomy and the legitimate interests of the women. This dichotomy has relegated women's rights to an inferior position when confronted with collective religious rights. Moreover, though it may be contended that the Court has taken the role of the reformer on certain occasions, such occasions belong to a minority of the judgments rendered by the courts of the country.

In the case of *Shayra Bano v. Union of India*[128], the Apex Court, in a remarkable judgment with a 3:2 majority, categorically ordered the practice of triple talaq (*talaq-e-biddat*)[129] to be set aside. Under triple talaq, the husband could divorce his wife instantaneously and unilaterally, thus defying the notion of equality. The Triple Talaq case happens to be one of the breakthrough judgments which could shape the future of tension between personal law and the fundamental rights of women. The primitive practise of triple talaq, which gave a Muslim husband atrocious power to divorce his wife, has taken a jolt unilaterally. The judgment has been hailed as progressive and optimistic from different academia worldwide for constitutionally protecting Muslim women's rights from medieval practice. Renowned scholar Faizan Mustafa notes in this context that the judgment is a positive indicator of the future where personal laws trump the basic fundamental rights of women; however, he believes legal reform alone is not sufficient in itself in the absence of social-driven reform.[130] The two-judge bench held the triple talaq case as unconstitutional: violative of Article 14 and thus denying equality to Muslim women. However, the bench restricted its judgment to the constitutional issue of

[127]Danial Latifi v. Union Of India, (2001) 7 S.C.C. 740, 746 (India).
[128]2017 SCC 1 (India).
[129]A form of talaq divorce practised by the 90% or so Hanafi School of Sunni Muslims in India, though Hanafi School of Sunni Muslims in India is considered sinful.
[130]Faizan Mustafa, Law, Morality, Triple talaq, https://indianexpress.com/article/opinion/columns/law-morality-triple-talaq-muslim-islam-4743272/ (last visited Jun. 22, 2021).

equality and did not delve into whether triple talaq is Islamic or Un-Islamic. The court annulled the practice categorizing it as arbitrary and putting Muslim women at a disadvantageous position with respect to their husbands. The majority held that although the *Muslim Personal Law (Shariat) Application Act*, 1937 ("1937 Act") monitored triple talaq, its practice was unconstitutional owing to its manifestly imperious nature and in violation of the right to equality of Article 14 of the Constitution of India. The issue to be resolved was whether the 1937 Act fuses triple talaq and hence could be struck down, or if personal laws are not included under Article 13(1) of the Constitution, which states that laws in force inconsistent with constitutionally protected fundamental rights are void. Interestingly one judge remarked that triple talaq is not part of Islam therefore devoid of any protection by the fundamental right of freedom of religion. While Justice Kurian categorically stated that triple talaq is contrary to the Quran, therefore, it could not be allowed. In the same judgment, the two dissenting judges held the practice to be an essential practice of Islam therefore protected by the freedom of religion. The issue is, therefore, a result of academic vigour concerning religious autonomy and constitutional equality. In the instant case, the judgment fuelled the vehicle of women empowerment by invalidating the practice. How far-reaching consequences the judgment will have will be decided by time. However, the judiciary's legal push indeed struck a chord with the idea of equality and a just society. In the same judgment, the two dissenting judges held the practice to be an essential practice of Islam therefore protected by the freedom of religion. The issue is, therefore, a result of academic vigour concerning religious autonomy and constitutional equality. In the instant case, the judgment fuelled the vehicle of women empowerment by invalidating the practice. How far-reaching consequences the judgment will have will be decided by time. However, the judiciary's legal push indeed struck a chord with the idea of equality and a just society.

In the instant case, the majority applied the test of manifest arbitrariness and accordingly held the practice violative of Article 14 right to equality; upon applying the test of manifest arbitrariness, the majority found the practice to violate a fundamental right under the Article 14 right to equality. The nature of talaq makes the practice itself arbitrary and diametrically opposite to the very notion of equality by putting the husband on a superior plane in terms of power exercising talaq. As a result, the Shariyat Act contradicts the fundamental rights of the Muslim women provided under part III of the Constitution.[131] Kurian J held that, "To freely

[131]"Must be struck down being void to the degree that it recognizes and drives Triple Talaq" (para 57).

profess, practice and propagate the religion of choice is a right guaranteed under the Indian Constitution […] However, respectfully differ from the statement that triple talaq is an indispensable part of the religious practice. Solely because a practice has continued for long, which by itself cannot make it legitimate if it has been expressly held to be impermissible."[132] The *dissenting* verdicts from Chief Justice Jagdish Singh Khehar and Justice S Abdul Nazeer highlight that the triple talaq system is not regulated by the 1937 Act but rather enjoys constitutional protection under Article 25 as an inherent part of personal law. The disagreement instead called for an injunction on the practice of instant triple talaq for six months such that the legislature could then address the matter.

The Constituent Assembly aimed "to protect 'personal laws' of diverse communities by advancing their stature to that of other fundamental rights" (para 94). In dissimilarity with the majority, the dissent also observed that "we cannot hold, the practice to be void in law, simply at the asking of the petitioners, just because it is deemed bad in theology".[133] Eventually, the dissent determined that it was not the role of the courts to change the law on the focus of triple talaq. However, it should instead be left to the legislature to conclude.[134] To reverberate the opinions of Justice Kurian in the decision, sequentially, the catechism of how to accord religion with other constitutional values lies in the controls of the legislatures. It will be up to future judges and lawmakers to ascertain the appropriate balance to secure peace, order, and good governance.[135] Going by what the Bombay high court unequivocally held in the connection to the entrance of women in the innermost sanctum of the dargah in the Haji Ali Dargah case (2016), the state is under a positive constitutional obligation to ensure that there is no gender discrimination. Preventing women's entry to the Sabarimala temple with an irrational and obsolete notion of "purity" offends the equality clauses in the Constitution. It denotes a patriarchal and partisan approach. The entry prohibition takes away the woman's right against discrimination guaranteed under Article 15(1) of the Constitution.

These contemporary judicial developments hint at the judiciary trying to find the balance and the tension between fundamental rights and religious autonomy. The triple talaq judgment

[132]Ibid at 24.
[133]Ibid at 127.
[134]Ibid at 198.
[135]Leung, Karlson: Reconciling Religion: Lessons Learned from the Triple Talaq Case for Comparative Constitutional Governance, VerfBlog, https://verfassungsblog.de/reconciling-religion-lessons-learned-from-the-triple-talaq-case-for-comparative-constitutional-governance/. (last visited Jun. 27, 2021).

reminds the plural ethos of a democratic setup where different religions and communities have norms of their own.[136] This results in conflicting tensions between the need to balance the autonomy of religious and cultural minorities and the protection of women rights, which often suffer from collective rights supremacy theory, which underpins the individual's rights. In that sense, the Shayara Bano judgment has paved the way for the future and hinted to the legislators for future reforms. Thus, the Indian Constitution, with its positive grants to the government for these special categories, has enlarged the judiciary's role, which interprets the core notion of equality in the extension of the theory of positive grants with inclusive ideals and furtherance of the substantial model of equality.

This contrasts with the American scenario where the Constitution grants equality to women but fails to grant any positive rights. Consequently, the Supreme Court of the U.S. has restricted its interpretation to the strict model of equality. It reinforces the stance of the Indian judiciary in protection of not just the legitimate rights of the women on the lines of notional equality but also at the same time construing provisions of the Constitution to the advantage of the women to remedy the historical injustice, thereby making Constitution a vehicle of social change.[137]The departure from the formal set of equality could be predicted with the inclusion of positive rights favouring women from the commencement of the Constitution. Indeed the academic rigour of the Constituent Assembly could well acknowledge the unjust society of the past. In this context, the framers put these provisions under part III to make it justifiable given the fragilities involved in enforcing such positive rights. However, practical interpretation beyond the protectionist regime has substantially fractured the ideals of equality and even imparted judicial authority to the theory of gender roles. In this context, Anuj Garg could be the answer to remedy the situation and provide the foundation for progressive judgments in future, further consolidating the principle of anti-stereotyping in the equality jurisprudence concerning women in India.

What emerge from the above discussion are glimpses into the fractured armour of constitutional justice in India. Does that suggest we abandon the Constitution? Of course not, because the Constitution is more than mere document listing rights and guarantees of the citizens of India;

[136]Faizan Mustafa, Freedom of Religion in India: Supreme Court Acting as Clergy, 2017 BYU L. Rev. 915 (2018)
[137]Agnes, Flavia, The debate on triple talaq and Muslim women's rights, https://scroll.in/article/808588/the-debate-on-triple-talaq-and-muslim-womens-rights-is-missing-out-on-some-crucial-facts. (last visited Jul. 5, 2021).

it is a charter that defines how India as a country should work towards a shared future that is not detrimental to any of its citizens. Nevertheless, there is a peril in romanticizing the Constitution in an age where even the ideals of equality and freedom have faced a neo-liberal appropriation: economically and culturally. The activist function played by the Supreme Court in the 1990s that redefined the right to life (Article 21) by expanding it to include a whole range of situations where rights are absent, to the present period where the judiciary has been complicit with the market in shrinking the spaces for allowing access to justice and meting out distributive justice, requires an acknowledgement that the law's letter derives meaning from the socio-political contexts in which it is used and applied. While we cannot afford to abandon the constitutional guarantees of equality and non-discrimination, we must ask critical questions about whether the pursuit of equality has itself become a discriminatory enterprise.

IV.II U.S Scenario

The perception of equality that has dominated Western thought since the time of Aristotle has been one of formal equality. The doctrine of equality is, of course, integrated into the Declaration of Independence. Equality has been interpreted as "treating likes alike", its constitutional expression in American and subsequently Indian equal protection doctrine, like the requirement that "those (who are) similarly situated, be treated similarly".[138] With this prevailing conception, equality is equated with sameness. Indeed, sameness is the entitling criteria for equality. In the 1990s, a few remarkable decisions were pronounced.

In particular, two decisions distinctly held that pre-emptory challenges premised on gender contravene the equality clause of the Constitution. In JE.B. v. Alabama[139], the question involved the inclusion of women in a jury, which led to the suspicion of whether it will lead to a feminine-biased outcome. Thus this pre-emptory challenge by the petitioner raised the issue of whether such inclusion or exclusion would hamper the fair trial to be moved by the jury. So evidently, the argument raised was whether such a female-intensive jury would eventually dampen the state's objective of a fair trial. This, in turn, raised how to decide whether there is any conclusive answer to this female-dominated jury's conundrum. However, the court made an interesting decision in this regard and held that the gender differences in society might not necessarily be implied in law. It stressed that such differences in gender existing might not be recognized in law. It cautioned towards the dangerous approach of using sex as a classification for an ulterior purpose like bias-ness, thus negating the very essence of the equality principle and thus unconstitutional. Therefore such pre-emptory notions have to be delicately balanced against the equality clause. In the concurring opinion, the majority of the Court categorically stated to differentiate what is existing in fact and what is in the law and two not to be interchangeable in that sense. Thus it made it clear how the jurisprudence would develop on the question relating to such challenges. So this decision also clears the hovering clouds on the question of pre-emptory challenges.

[138]Jospeh Tussman and Jacobus tenbroek, The Equal Protection of the Laws, 37 Cal. L. Rev. 341 (1949), https://josephtussman.files.wordpress.com/2020/08/fulltext.pdf. (last visited Jul. 10, 2021).
[139]511 U.S. 127 (1994).

A more nuanced decision is found in the *United States v. Virginia*[140], analysing the equality clause of the Constitution. In this landmark case, the Court categorically invalidated the law, which allowed the exclusion of women in a Military Institute in Virginia again premised on gender differences. The justification of gender differentiation was short of the Constitutional requirement as it failed to provide any remedy with regard to the exclusion. The Court, therefore, held the law to be violative of the Constitution. The application of the intermediary test in this context holds significance as the law failed to meet the standards of the test. The fact that a particular institute was established for women could not convince the judges. It also implied that any such classification should essentially further the government's objective and not merely be invoked on some secondary or hypothetical situations, which eventually end up as a proxy for the inherent bias in the law. Thus the justification has to be premised on solid grounds and truly justifiable, necessitating such classification. This case indeed called for a nuanced analysis of mid-level scrutiny to such classifications. So any arbitrary generalization or unsubstantiated justification would not meet the requirements of the equality clause of the Constitution. This, in turn, would undoubtedly prevent the cases of such classification based on gender to be used as a proxy for biasness. The Court, in this case, had also highlighted the importance of remedy to such exclusion and whether it is justifiable given the disadvantage. As in the case, the premier institute meant for women was not a sufficient remedy. Also relevant is the observation by the Court that generalizations and stereotypes should not guide the classifications and should instead keep a broad framework in making such exclusionary laws. The Apex Court also reiterated that 'sex classifications may be used to compensate women for particular economic disabilities they have suffered, to promote equal employment opportunity, to advance the full development of talent and capacities of nation's people; but such classifications may not be used to create or perpetuate legal, social, and economic inferiority of women.

Most American antidiscrimination laws regulate classification rather than classes.[141] For example, *the Equal Rights Amendment (ERA)*, which would have prohibited discrimination based on sex, would have adopted classification, not a class. For the most significant part, so does judicially crafted gender discrimination law following the Equal Protection Clause. Indeed, male plaintiffs initiated two-thirds of the constitutional sex discrimination trials that

[140]518 U.S. 515 (1996).
[141]Eileen Kaufinan Women and Law, Georgia Journal of International and Comparative Law, Vol. 34 (2006).

have gone up to the Supreme Court. The Virginia case is the rare recent counterexample of a case initiated on behalf of excluded women. It is thus clear from the perusal of the above decisions that the Court adopted and stuck to the formal theory of equality as embedded in the Constitution. The theory of substantive equality is thus the prerogative of the legislature and not the judiciary. In the context of India, we see that the theory of substantive equality has been judiciously applied and reinforced throughout a series of judgments. These decisions furthered the theory of affirmative action, which is absent in the context of the U.S. The decision in *Washington v. Davis*[142] unquestionably reflects the approach of the U.S. Supreme court in sticking to the formal theory of equality and discarding the substantive theory of equality. In this case, a differentiation was made with respect to the Blacks and Whites and was related to racial discrimination. The law tried to further the substantive theory of equality, which was eventually invalidated in this case. In the setting of gender discrimination, another decision in the case *Geduldig v. Aiello*[143] is an apt illustration in this context. In this particular case, the insurance system pertaining to disability excluded pregnancy-related disabilities. However, the Court held the classification to be justified as it only made a rational classification based on pregnancy and not any arbitrary classification. As a result of the classification, only women were hit by it as only women get pregnant, thus making it disadvantageous for them. The consequences, howsoever disadvantageous for women, did not violate the equality clause of the Constitution. The application of the formal theory of equality is precisely woven into the decision of this case.

In other words, classifications that disadvantage women do not violate equal protection unless the plaintiff can demonstrate that the legislature acted to hurt women. Another example of the Court's refusal to consider the disparate effects of classification is *Personnel Administrator of Massachusetts v. Feeney.*[144] There, the Court rejected an equal protection challenge to veterans' preferences in employment, which overwhelmingly operated to exclude women—citing *Washington v. Davis*[145], the Court concluded that the equality guarantee was not violated absent proof that the legislature enacted the policy to exclude women. In other words, demonstrating that the legislature enacted the law with knowledge of its consequences does not establish the requisite intent. Thus, the Court in Feeney rejected the common-sense proposition

[142]426 U.S. 229 (1976).
[143]417 U.S. 484 (1974).
[144]442 U.S. 256 (1979).
[145]426 U.S. 229 (1976).

that an actor is generally thought to intend the foreseeable and natural consequences of his or her actions and reversed the district court which, in a concurring opinion, had held that "the cutting-off of women's opportunities was an inevitable concomitant of the chosen scheme-as inevitable as the proposition that if tails are up, heads must be down. Where a law's consequences are that inevitable, can they meaningfully be described as unintended? The Court's answer is yes, representing a definitive repudiation of substantive equality in favour of formal equality: "the settled rule [is] that the Fourteenth Amendment guarantees equal laws, not equal results." The Court's strict adherence to formal equality has been unwavering and linear. The Court has moved from upholding sex classifications because women and men are different to upholding sex classifications because men and women are the same. At both ends of the spectrum, the Court has retained its commitment to treating equals alike. This rigid adherence to principles of formal equality is not reflected in the jurisprudence of the Indian Supreme Court.

It can be concluded from the preceding paragraphs that the approach of the Court has evolved; however, it has far from the ideal situation in the interpretation of women equality issues. While the constitutional text offers the formal theory of quality, the Court has conveniently also chartered its way of pronouncing judgments on a substantial model of equality. This is undoubtedly a significant step given the prevalence of substantive inequality in society. In particular, an interpretation of such line of reasoning is mainly in the context of pregnancy, and related reproductive rights of women have significance in the equality jurisprudence on women.

Infringements of reproductive rights disproportionately harm women due to their capacity to become pregnant and legal camouflage of these rights as human rights are crucial to facilitating gender justice and equality. The states that had earlier stringently restricted abortions or barred entirely, based on longstanding legal tradition in the U.S., were forbidden by the country's Supreme Court from meddling with this lately defined "right." Through its three significant abortion rulings[146], Supreme Court has defined the outlines of women's abortion rights in a wave extending safeguards in lines of liberty and equality. The U.S. Supreme Court, in its landmark ruling *Casey*[147], while reaffirming *Roe's* central holding: stressed the underlying

[146]Roe v. Wade 410 U.S. 113 (1973), Planned Parenthood of Southeastern Pennsylvania v. Casey 505 U.S. 833 (1992), and Whole Woman's Health v. Hellerstedt 579 U.S. 582 (2016).
[147]Ibid.

values of dignity and equality that the abortion right exhibits. In its joint opinion, the Court departed from strict scrutiny. It adopted the *"undue burden"* standard to resolve which restrictions were unconstitutional. *Hellerstedt* reaffirmed Roe, subsequently clarifying that an undue burden test is a form of heightened scrutiny that compels courts to conduct a meaningful review of abortion restraints. By striking down politically motivated limitations that had made it nearly impossible for Texas women to utilise their full reproductive rights, the Court's progressive jurisprudence upheld every woman's right to legal abortion, irrespective of place of residence.

Still, the approach has ably not empowered the jurisprudence to equality of condition despite the decisions aiming to remedy such discrimination. Current abortion bans and restrictions already place abortion out of reach for many people.[148] These new provisions were legislated to evade judicial scrutiny by excluding state officials from enforcing the law. A kernel human rights principle forbids retrogression, a backward step in policy or legislation that prevents or limits the enjoyment of a right. Supreme Court bench of ultra-conservative majority opined it did not have the power to enjoin S.B. 8 and refused to intervene.[149] Though the Court's verdict was procedural, it spoke volumes about the justices' outlook on the value of abortion rights and gender stereotypes of women being second class citizens. Gender sensitization of Judges outside of politically motivated policies is hence essential for a progressive and fair approach in justice delivery. This problematic issue dents the equality jurisprudence in achieving equal conditions for women in society who continue to be discriminated against based on biological differences.

[148]S.B. 8, or "The Texas Heartbeat Act," went into effect Sept. 1, https://www.justice.gov/opa/pr/justice-department-sues-texas-over-senate-bill-8 (last visited Sept.29, 2021).
[149]Pro-Choice Groups Ask Supreme Court for Emergency Halt To.., FORBES, https://www.forbes.com/sites/alisondurkee/2021/08/30/pro-choice-groups-ask-supreme-court-for-emergency-halt-to-texas-abortion-ban-this-week/ (last visited Sept.29, 2021).

CHAPTER V

V. CONCLUSION

Keeping in mind the hypothesis, it is vital at the outset to consider the following observations:-

(a) Although the U.S. Constitution mentions no explicit provision for women and therefore makes no distinction in offering the right to equality to men and women. Consequently, the essence of the Constitutional text has been the formal equality model post the Fourteenth Amendment. However, the destiny of any Constitutional text lies in how the Courts interpret it. The interpretations in the American jurisprudence on the right to equality has seen itself *departing from the traditional theory of formal equality charting into the substantive model* by imparting substantive content to its interpretation. Therefore it affirms the hypothesis that the U.S. has not strictly adhered to its formalistic model of equality invariably and also has made substantive interpretations in the jurisprudence of the right to equality for women.

(b) The Indian Constitution has expressly provided for the positive grant of rights. This, in turn, meant that there was a golden opportunity for the empowerment of women. However, while few cases have provided the *optimistic* glimpse for empowerment, nevertheless many judgments failed to prove effective beyond the protectionist regime and played the role of benevolent protector, further consolidating the gender roles (although exceptions do exist).

As the preceding chapters reveal, the notion of equality in text and its implementation varies for each jurisdiction. The theories of equality have been built in both India and U.S. in a different context and with distinct aspirations. Indeed, the social milieu is a decisive factor in determining the course of the right to equality with respect to women. As a result, the same theory of equality offers different understandings in both countries. Further, it is notable that the justifications offered by each jurisdiction are different and premised on distinct ideas of equality. However, history has had a role in determining the approach and how jurisprudence on it were to be developed and evolved. The Courts of both countries have provided judicial

interpretations on the right to equality. However, the question is if it serves the objective of having the equality clause in the first place.

It is pretty evident that in the U.S., the Court has chartered its way into the substantive model even in the absence of exclusive provisions for women. On the other hand, the Indian Supreme Court has followed the substantive model of equality with affirmative action at the core of its approach.[150] The formal theory is limited in its scope given the fact that it provides equality in the ambit of activities that of men. So the essence of the American approach has been to provide women with their due equality protection where they have been treated differently despite being in the same situation. As a result, it is seen that the norm of equality has been restricted to spheres only where men are involved. This, in turn, excludes experiences like pregnancy and other experiences exclusive to women only. This issue is reflected in the decision in *Geduldig v. Aiello.* The physical nature of women long dominated the issue of equality for women post the adoption of the Fourteenth Amendment. For instance, the childbearing role of women has had an impact on the judicial decision, as a result of which the approach premised on such justifications. The decision in Geduldig certainly highlights the issue with this approach on equality which has had disparate outcomes.

Fundamentally the formal theory of equality, which is rigid in nature, can have inequitable outcomes given the social milieu. Therefore it is vital to acknowledge the differences and dilute the rigidity of the formal theory of equality and incorporate some tents of the substantial theory of equality in order to plug the gaps in gender inequality. While similar treatment is important, given the context of society and the grim history of inequitable gender dynamics, it is crucial that to make the equality clause effective in spirit, the interpretation of it more broadly construed and provides room for the substantial model of equality. Given the grim history of patriarchal society suppressing women's basic rights, it is indeed the judiciary that has to plug the gaps to make room for social reform and balance gender rights.

Women's freedom from stereotypes of fragility and dependence, on this view, requires men's freedom from stereotypes of aggressor and paterfamilias. Equality functions as a preference for fluid over fixed identity, and fluid identity depends upon disaggregating the biology of sex

[150]Gender equality and women's empowerment in India, https://dhsprogram.com/pubs/pdf/od57/od57.pdf (last visited Jul. 17, 2021).

from the culture of gender. Under this approach, a man alleging sex discrimination virtually represents women's best interests and his own. For example, as discussed in Chapter III *Joe Hogan*, challenging his exclusion from a women-only public nursing school, helped women break out of stereotypically female occupations just as did the woman who, as a high school student, initiated the United States' suit to open the Virginia Military Institute to women.

As understandably, the substantial model of equality promotes the acknowledgement of the past subjugation of rights and not just limiting itself to the notion of equal treatment; it helps bring women on par with men in terms of rights. The inequitable consequences of the differences on the basis of sex had negated the principle of equality in essence, as the slate was never clear when the Fourteenth Amendment was adopted.

However, the preceding chapters have made it clear that the approach of the Indian Apex Court has been different altogether given the fact that the Constitutional text provides exclusive provisions for women, which is absent in the American context. Affirmative action and protective discrimination lie at the heart of the approach of the Indian apex court, which has relied on Article 15(3) to further the interests of women. Article 15(3) no doubt has been used as a potent tool to empower women by taking the route of affirmative action given the grim history of subjugation of women. For instance, India has had practices like Sati in the past; therefore, to bring men and women on equal footing has been the challenge for the Court. No wonder it is precisely this grim past that must have made the Constitutional fathers include exclusive provisions for the advancement of interests of the women. They perhaps knew that mere identical treatment would not do enough to give equality in the real sense and not just a textbook thrust on the principle of equality. In this context, the Indian approach to be more nuanced, taking into account the past discrimination and subjugation of women. Therefore affirmative action could be the possible solution to remedy the history. While the model of formal equality has been used to uphold the classifications on the basis of the physical or social construct of differences between men and women, the substantial model goes one step ahead in providing for affirmative action. The issue with the application of the formal theory of equality at times has been that it has further consolidated the gender roles and stereotypes created by society. Some of them even reflect the patriarchal norms, which in turn further excludes women from playing specific roles in society. It is such gender roles created by the society which furthers the gap between men and women, where gender dynamics has become only inequitable in essence.

It is interesting to note that the Constitutional text of Article 15(3) offers the substantial model of equality, which has been used in many cases; however, there has been a slew of cases that have only reinforced the socially constructed gender roles, which impedes in the realization of the right to equality in spirit. As pointed out by scholars, the judicial interpretation on matters related to sex has often reeked of short-sighted vision in providing meaningful and progressive decisions. Such interpretation has acted in resulting in the segregation of gender from sex. This, in turn, has cause to provide validity to laws that are inherently discriminatory in nature. As discussed in the second chapter, the decision in the *Meerza* case illustrates this issue. Such approach central to protectionism has paved the way to consolidate stereotypes apart from the subjugation of women by limiting their choices which ideally should be at the centre of any debate of equality pertaining to women. However, on the contrary, some of these cases dealing with Article 15(3) has conveniently relied on a weaker sex approach which is strikingly similar to the early approach of the U.S. Supreme Court, which has again furthered the gender roles and, in fact, hurt in what could be a tool of empowerment for women or in the least bring women on equal footing as that of men.

The decision in *Anuj Garg* serves as an apt illustration of the issue of the separate sphere theory, which many cases have propagated in the name of equality which is farcical on the face of it. The anti-stereotyping principle incorporated in this case certainly provided a golden opportunity for a progressive interpretation of equality issues with respect to women. Interestingly, the judgment relied on a few American cases as well. The anti-stereotyping principle certainly is a potent tool in the jurisprudence on equality. In both jurisdictions, the regressive separate- sphere only fuelled the already established gender roles of the society, which is common to both societies, although at different levels. The stereotyping of the sexes has been evident in the jurisprudence of both countries, thereby denying the realisation of actual equality; instead, it has reduced the notion of equality on a more regressive plane. If there was a *Meerza* for the Indian jurisprudence, *Bradwell* in the American jurisprudence did the damage. All similar cases essentially took the role of benevolent protector on the confrontation of equality issues with respect to women. It requires no further analysis of why these -similar cases are at best regressive.

The discussion certainly leaves a clear idea in the reader's mind about what is regressive and what serves the idea of progressive jurisprudence. Understanding this distinction is essential to

understand the fundamental nuances of equality jurisprudence on women. Categorical classification based on biological differences has been a low-point in both the jurisdictions, which unites them, in the regressive sense, despite the distinct Constitutional texts of both the countries.

However, it is interesting to note that sexual violence has been tackled differently in the Indian context than in the American approach. As discussed, the decision in Morrison highlights this particular issue. The apex court in India has categorically acknowledged that gender and sexual violence puts women on a lower pedestal as a consequence of which they are not on the same footing as that of men and has resulted in a skewed equation. Also, since the substantive model of equality is very much part of the Indian context, it has furthered the empowerment of women by taking the route of affirmative action. This approach has led to a series of judgments upholding the reservations for women in different spheres. Such cases adequately reflect that providing remedy is the answer for discrimination in the past and not just a matter of exception.

It is crucial in this context to understand that the distinct approach of both these courts lies premised on the text of the Constitution itself. It portrays the difference in the Constitutional text where the Indian text provides for a system of a positive grant, affirmative action premised on the substantial model of equality, absent in the U.S. Constitution. The conferment of positive rights is thus exclusive to the Indian jurisdiction. In contrast, the U.S. jurisdiction in the absence of any provision exclusively for women has limited its scope to the formal theory of equality. These cases signify the Court's recognition that compensating for discrimination is not an exception to equality but a means of achieving equality. Ultimately, the roles of the Supreme Courts of India and the United States reflect the differences between the two constitutional regimes. Although both constitutions make equality a core value and prohibit the State from denying equal protection of the laws, the Indian Constitution also contains a positive grant of power to the government to take steps to eliminate inequality. This mandate is not found in the U.S. Constitution, and the U.S. Supreme Court has not interpreted the equality guarantee to confer any positive rights. Instead, the U.S. Supreme Court has adhered to formal equality theory, initially rely on women's weak physical structure and maternal function to uphold gender classifications and, more recently, to deny the existence of gender differences to strike down sex classifications.

In India, the Supreme Court's treatment of equality claims is more multi-layered, reflecting the Constitution's commitment to the use of protective discrimination to achieve equality. Formal equality theory has been employed to uphold classifications based on actual or socially constructed differences between men and women. Many of these cases represent simple protectionism, revealing underlying patriarchal norms that exclude women from the workplace and civic responsibility. Further, drawing on constitutional provisions that authorize and embody substantive equality theory, the Supreme Court of India has consistently upheld reservations for women in legislative bodies, municipal corporations, and public employment. These cases signify the Court's recognition that compensating for discrimination is not an exception to equality but a means of achieving equality.

Conclusively, the roles of the Supreme Courts of India and the United States reflect the differences between the two constitutional regimes. Although both constitutions make equality a core value and prohibit the State from denying equal protection of the laws, the Indian Constitution also contains a positive grant of power to the government to take steps to eliminate inequality. This mandate is not found in the U.S. Constitution, and the U.S. Supreme Court has not interpreted the equality guarantee to confer any positive rights. Instead, the U.S. Supreme Court has adhered to formal equality theory, initially relying on women's weak physical structure and maternal function to uphold gender classifications and, more recently, denying the existence of gender differences to strike down sex classifications. It has even been reluctant to follow the principles of international given the form of federal structure the U.S. follows. It can be concluded from the preceding paragraphs that the approach of the Court has evolved; however, it is far from the ideal situation in the interpretation of women equality issues. While the constitutional text offers the formal theory of quality, Court has conveniently also chartered its way of pronouncing judgments on the lines of a substantial model of equality. This is undoubtedly a significant step given the prevalence of substantive inequality in society. In particular, an interpretation of such line of reasoning is mainly in the context of pregnancy, and related reproductive rights of women have significance in the equality jurisprudence on women. Still, the approach has not ably empowered the jurisprudence to equality of condition despite the decisions aiming to remedy such sex-related discrimination. This problematic issue dents the equality jurisprudence in achieving equal conditions for women in society who continue to be discriminated against on the basis of biological differences.

On the other hand, the Indian Supreme Court has issued a comparable set of formal equality decisions. However, it has not meaningfully moved beyond the protectionist stage, as pointed out by Indira Jaising. Therefore raising questions about what utility has the substantial model of equality served in India despite the existing provisions providing the requisite space for progressive judgments on the model of substantial equality, which is the answer to the substantial inequality which plagues the hierarchy of Indian women. Despite this, the Indian Supreme Court, relying on constitutional provisions and international covenants, has been willing to deviate from its adherence to formal equality theory. The Court has recognized that formal equality can stand in the way of true equality and, at least, interpreting personal laws, upholding reservations for women, and seeking to ensure women's freedom is well entrenched in the Indian jurisprudence.

The Constitution of India has granted a protectionist discrimination approach for the vulnerable that have historically been denied basic rights, and women have been worse off amongst this vulnerable group despite the right to equality firmly rooted in the Constitution. The equality principles are woven throughout the Indian Constitution, where Article 14 is just the starting point that provides for equal protection of laws which resembles the equality clause principle of the U.S. Constitution. The Constitution provides Article 15(1), which prohibits discrimination on the basis of sex, along with Article 15(3), which provides for positive discrimination for women and children. It is relevant to note that all these Articles are under the Part III of the Constitution, thereby enabling to invoke writ jurisdiction as they are enforceable in the Court of law: the High Court and the Supreme Court.[151]Therefore, Article 15(3) becomes a potent tool for the Legislature to further the interests of these particular categories of which women find themselves at the centre of such a protectionist regime. At the same time, the judiciary has used Article 15(3) as armour for the benefit of women.[152] In the same part III, Article 16 provides for non-discrimination in public employment, and Article 16(3) further provides for special provisions for special and economic backward class. Although women have obtained a level of fiscal and political autonomy and cognizance about their rights, yet they experience incapacity in bringing about fundamental changes for eradicating gender inequalities from society.

[151]The High Court has more expansive powers under Article 226 regarding writ jurisdiction compared to Supreme Court's power under Article 32.
[152]The recent Triple Talaq judgment is an apt example; Shayara Bano v. Union of India.

While often painted as a world leader, the United States falters behind the 76 per cent of countries worldwide with constitutions that guarantee equal rights for women. When written, the U.S. Constitution reflected a moment when transcendent views of women and women's positions were immensely varied than they are today. Since the 1950s, equality rights jurisprudence moved in opposite directions in the United States and India. In the United States, the broad remedial powers needed to enforce desegregation decisions leading to widening the scope of remedial actions. Starting in the 1970s, however, reactions against these broad remedial powers reversed the trend and led to a narrowing of the use of equity power that has continued to the present. The narrowing of federal equality jurisprudence based on a positivist and formalist understanding of the purpose of legal remedies, as well as a restrictive reading of the scope of Article III, has shifted the conversation regarding rights violations away from the needs of a given social group at any particular moment in history. It entangles the Court and the public with formal "side-issues about precedent, texts, and interpretation."

In India, very different historical events led to the opposite trajectory. In the 1950s, the courts hesitated to use their broad equity powers and chose to defer parliamentary interpretations and legislative actions to enforce fundamental rights. By the 1970s, however, the comprehensive understanding of the abuse of Constitutional endowments by the legislature during the Emergency gave rise to a much more intrepid use of equity power through the tool of Public Interest Litigation to render the social reformations that were envisioned by the Constituent Assembly and described in the Constitution. Therefore, both the jurisdiction differs based on Constitutional text, and it provides additional room for distinct interpretations.

A constitutional guarantee of equality is a crucial element in securing gender equality in access to justice. While constitutional guarantees of equality do not necessarily guarantee that equal rights will be available to women in usage, the articulation of equality for women is an essential base for realising women's rights and is a requisite expression of political will.[153] Constitutional rights are never deciphered or implemented in a political or ideological vacuity; quite simply, equal treatment of all genders is necessary for any welfare state. The Indian judiciary, however, shapes the dialogue and keeps revising the gender justice theory based on models accepted worldwide. The Courts have confronted all human rights violations and directed the government to act against them. The only resort for them is to stay faithful to the Constitution

[153]Raday, Frances. "Women's Access to Justice." https://www2.ohchr.org/english/bodies/cedaw/docs/Discussion2013/Ms.FrancesRaday.pdf. (last visited Jul. 25, 2021).

and evade judicial overreaching. The flexible Public Interest Litigation system has exhibited positive results, while the Constitution encompasses the legal basis for establishing gender justice norms.

In the context of balancing the constitutional right of equality of women against the text of different religions, inspirations from other jurisdictions can do justice to normative standards of equality. Given that practices of religion can trump equality despite the clear mandate in the Constitution disturbs the balance between religious autonomy and the fundamental right of women's equality, for all these triple talaqs was a reality in the Indian jurisdiction negating the right of equality of Indian Muslim women. All of this is in the name of religious practice, which has often undermined women's right to equality. Both being fundamental rights in the Indian Constitution often pose a severe challenge to the judges to negotiate and balance these two rights. The discretion vested with the judges even makes the issue more pressing. In India, the test of essential practices is the determinant yardstick in deciding such confrontation. The current jurisprudence on this is quite optimistic.

As India has remained unfrequented, to a great length, from the organised feminist campaigns of the 20th and 21st centuries in the U.S, the growing sphere of women in civil society, politics, and India's armed forces have been marshalled, brought to point by various judgments of the Supreme Court. These pronouncements have gradually chipped away at some of the anachronistic practices and norms that have long held women on the sidelines and have floored the way for the executive and the legislature to take measures to uphold women's rights in the country. A landmark ruling in protecting women's rights in the context of the family is the Supreme Court's decision in *Vineeta Sharma v Rakesh Sharma(2020)*[154], where the court opined that daughters shall possess equal coparcenary rights in Hindu Undivided Family property by their birth and could not be barred from the inheritance, irrespective of whether they were born before the 2005 amendment—upholding similar equality jurisprudence in *The Secretary, Ministry of Defence v Babita Puniya (2020)*[155] case, the court held that women army officers were eligible for permanent commissions, enabling them to be in command positions. Women officers are forthwith on par with their male counterparts regarding promotions, rank, benefits and pensions, thereby strengthening their spot in the defence sector, an institution with stringent gender norms, due to the optimistic approach adopted by the court. A similar stance

[154] Civil Appeal 32601/2018.
[155] Civil Appeal Nos. 9367-9369 of 2011.

was iterated in the interim order in the *Kush Kalra* (2021)[156] petition recently for allowing women to attempt National Defence Academy examinations.

Also, since it is, the judges who have the discretion and supposedly the theological understanding, which ideally is not what the judges are to do as pointed out by J. Chandrachud in the recent exchanges in the Sabrimala issue, establish a critical question then as to how ideally should such matters involving the essential practice doctrine be settled. The significance of this doctrine was tested in the Sabrimala case, along with the right of menstruating women to worship in that temple.[157] In hindsight, such perceptions attached with religious connotations usually question the justness of the religious manuscript when it tends to enfeeble one section of the society based on natural differences. It is in this background that inspiration from other Constitutional jurisdictions needs to be taken. For example, many constitutions with an override clause, which includes derogation from the gender equality guarantee for any system of norms that may discriminate against women, violate the normative equality standards and is a delicate issue given the fundamental right of religious autonomy. However, at what cost is the question. Whether such religious practices can be allowed to undermine something like a right to equality? It becomes even more relevant because it forms the part of basic structure doctrine as evolved by the court in the *Keshavananda Bharati*.[158] The countries that entrench religious law are mostly the Islamic Republics and Arab Republics. In the Asia-Pacific region, Buddhist and Christian countries do not give primacy to religious principles. For the Indian jurisdiction, it is imperative to take a lesson from some South-East Asian jurisdictions. Hon'ble Apex Court departed from its traditional recalcitrance in issuing judgments in matters of faith while passing its verdict in the *Sabrimala (2019)* issue. The court held that devotion could not be subjected to gender discrimination. It permitted the entry of women of all ages into the Sabarimala Temple despite a centuries-old custom banning the entry of menstruating women.

Infractions of reproductive rights disproportionately harm women due to their ability to become pregnant and legal certainty of these rights as human rights are crucial to facilitate gender justice and the equality of women. The Indian constitution recognises many of these

[156]Supreme Court Passes Interim Order.., LIVELAW, https://www.livelaw.in/top-stories/supreme-court-allows-women-to-take-nda-exam-interim-order-179795. (last visited Aug. 18, 2021).
[157]Indian Young Lawyers' Association v. State of Kerala 2018 SCC OnLine SC 1690 (India).
[158](1973) 4 SCC 225 (India).

reproductive rights as fundamental, including the right to equality and the right to life, which progressively is understood into jurisprudence to incorporate the rights to health, freedom from torture and ill-treatment, and privacy the government is obligated to uphold.[159] While in the *Suchita Shrivastava*[160] case, the Supreme Court pronounced a landmark judgment calling for women's right to autonomy concerning pregnancy held that a woman's right to make reproductive choices was imperative for women's right to equality. It is yet to opine if provisions of the Medical Termination of Pregnancy Act, 1971 ('MTP Act') violate Articles 14 and 21 of the Constitution of India, 1950.[161]

In the U.S., precedential decisions shielding reproductive autonomy—including in cases such as Roe v. Wade, which declared the constitutional right to obtain abortion care, and Cassey—have clarified that reproductive autonomy is central to women's capacities to engage equitably in society. The U.S. Supreme Court is yet to hear *Dobbs v. Jackson Women's Health Organization*[162], a case widely seen as the most momentous test of Roe to date. Envisioning possible action by the Supreme Court to restrict or reverse Roe entails an acknowledgement that due to ingrained structural and interpersonal discrimination based on race, gender identity, and disability, there still are women deprived of their rights in the states.

Moreover, the ERA could bolster these current constitutional protections and help safeguard against the growing onrush of attempts to curb access to reproductive health care, including contraception. It would provide additional support for this existing legal precedent and demonstrate fundamental respect for the value and support of women across the gender spectrum. Even without the ERA, precise parameters supervised by Supreme Court and other legal precedent have been expanded to determine when single-sex programs are permissible, such as when they are used to recompense for a particular class's historical, societal, and economic disadvantage. Constitutional protections against discrimination, and existing statutory protections, for that matter, are hollow without vigorous enforcement by courts.

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[159] Payal K. Shah, *Reimagining Reproductive Rights Jurisprudence in India: Reflections on the Recent Decisions on Privacy and Gender Equality from the Supreme Court of India* (Col Jour. of Gender and Law, Vol 39, Issue 2, 2020),

[160]Suchita Shrivastava v. Chandigarh, AIR 2010 SC 235 (India).

[161] Swati Agarwal v. Union of India, WP (C) 825/2019 (India).

[162]Dobbs v. Jackson Women's Health Organization, https://www.scotusblog.com/case-files/cases/dobbs-v-jackson-womens-health-organization/(last visited Sept. 28, 2021).

While the findings as illustrated above point to material progress and optimism made to safeguard the rights of women, the surging incidents of violence against women and their ongoing alleviation in various fields cannot but drive to the inference that there is still incongruity between the framing of laws and their implementation on the ground in both the countries. As the value of women's rights in the public and private sphere continues to advance, the law must evolve, accommodating their hopes and aspirations.

APPENDIX –I

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