

GENDER INEQUALITY IN PRESENT ERA: COMPARISON BETWEEN INDIA AND U.S.A

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ABSTRACT

Gender inequality can be broadly defined as the discrimination between Men and Women in providing equality opportunities, pay, and societal recognition on the basis of only the difference in the gender. Both India and the United States of America have a toxic history of gender inequality. Some of the societal practices are so deeply enrooted amongst the common mass of both the nations that even after so many years of independence and civilizational evolution, these practices continue to plague the countries at large.

It is not surprising that the Constitutions of both the countries that is India and United States of America guarantees sanctions against gender discrimination. In India there are special enactments and the Indian Constitution specifically guarantees protection against gender discrimination.

It has to be understood that the pivotal reasons for the discrimination against woman has been the archaic mindset of the Indian society at large. Ancient Indian practices like restricting woman from accessing education and confining the role of woman to the four walls of a house is still being followed in many parts of modern India.

However, with increasing awareness and change in the long-standing perceptions in this regard, we see that Indian woman in many cases have pioneered the cause of education, politics, entrepreneurship, scientific research and have emerged to be effective leaders of the country.

Laws can be referred to as a set of rules, norms, guidelines, customs accepted by the population at large to regulate the affair of the society. The imposition of penal consequences, sanctions make the laws binding on the citizens of the nation. However, the society is dynamic and people of diverse mindset reside within a society, it is for this reason the laws are not enough. Inclusive initiatives taken by the governments, both at State and Central levels become a very important tool to realise the laws formulated for abolishing and regulating certain activities that barbaric, unjust and have no relevance in the 21st century.

It is a known fact that laws are formulated by the government considering the needs of the society and its people. However, it is the legal fraternity that interprets, validates and creates an appropriate roadmap for the implementation of the laws.

In this article I shall manifest the various problems faced by woman in India and the United States of America. I shall also endeavour to show various Constitutional provisions dedicated to protect the citizens of these two nations from gender discrimination and its perils. This article shall highlight certain initiatives taken by the governments of India and the United States of America by including the population at large to fight the evil practices embodying gender discrimination. I would also cite various judicial precedents of these two nations pronounced over the years pertaining to gender discrimination. Thus, the article shall provide a holistic comparative analysis of the laws and policies of India and USA with regard to gender discrimination and throw a light upon the prevailing circumstances of these Nations.

Keywords: Gender Inequality, Evolution, Custom.

LAWS AGAINST GENDER DISCRIMINATIONⁱ

India

Looking into the laws against gender discrimination in India, I shall throw light upon the following Constitutional provisions and legislations:

1. Constitution of India: Article 14, Article 15 and Article 16
2. Pre-Conception and Pre-Natal Diagnostic Techniques (PCPNDT) Act, 1994.
3. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.
4. The Hindu Succession Act, 1956.
5. Muslim Personal Law (Shariat) Application Act, 1937
6. Equal Remuneration Act, 1976.
7. Criminal Law (Amendment) Act, 2013

Constitution

Article 14 of the Indian Constitution states as follows:

“The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.”

The abovementioned provision which emphasises on the element “*equality before the law or the equal protection of the laws*” of derives its origin from the American Constitution. Throwing light upon Article 14, it is explicitly clear that the India Constitution protects the rights of woman by prohibiting discriminatory practices against woman and provides a strong safeguard of their interests.

Article 15 of the Indian Constitution states as follows:

“Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth

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

2. *No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to - access to shops, public restaurants, hotels and palaces of public entertainment; or - the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public*
3. *Nothing in this article shall prevent the State from making any special provision for women and children*
4. *Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.”*

The above-mentioned Article clearly states that there would not discrimination based on sex. This Article acts as the fundamental basis of various legislations in India directed to safeguard the interests of woman in India.

Article 16 of the Indian Constitution states as follows:

“Equality of opportunity in matters of public employment

1. *There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State*
2. *No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect or, any employment or office under the State*
3. *Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment*
4. *Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favor of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State*

5. *Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination”*

From the above mentioned especially Article 16 (1), it is abundantly clear that the Constitution of our country provides for providing equal opportunities to men and women of the nation. Thus, in our country there cannot be any laws or policies that advocate discrimination with regards to employment and pay for such employment.

Pre-Conception and Pre-Natal Diagnostic Techniques (PCPNDT) Act, 1994

Female foeticide has plagued Indian society at large from time immemorial. History evinces that conceiving and giving birth to a girl child was once regarded a taboo in India. The PCPNDT Act, 1994 marked the end of such immoral practices. In the early 90's the ultrasound technique was used to detect the gender of a child in the mother's womb and the barbaric practice of destroying female foetus increases manifold. With the introduction of the PCPNDT Act, 1994 such heinous acts were finally curbed and the modern scientific techniques were restricted to detect the following:

- Genetic abnormalities
- Metabolic disorders
- Chromosomal abnormalities
- Certain congenital malformations
- Haemoglobinopathies
- Sex linked disorders.

The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013

This legislation is one the major leaps in ensuring the safety of woman in the work place. As a result of the observations of International Labour Organisation, the Vishakha Guidelines were

revised and the Act came into force with more stringent guidelines for ensuring the safety to woman at work place. In spite of the existence of this legislation, women continue to suffer from unprecedented miseries at the work place in India.

The Hindu Succession Act, 1956

Prior to 2005, the Hindu succession Act only granted “limited ownership” status of any inherited property to the daughters. However, after the amendment of 2005, the daughters were granted equal rights as that of sons pertaining to inherited property. This was a major leap in ensuring the rights of a daughter on the parental property.

Equal Remuneration Act, 1976

This legislation ensured that the employer could no longer discriminate men and women from receiving equal remuneration for works of similar nature. This legislation is of immense importance as it directly impacted the exploitation against women in terms of being paid the right remuneration to which they are entitled.

JUDICIAL PRECEDENTS

India

Vishaka and others v. State of Rajasthan (Bhanwari Devi Case)ⁱⁱ

In 1992, a lower caste social worker Bhanwari Devi, employed with the rural development programme of the Government of Rajasthan as a Development Project Worker, was brutally gang raped by five men of the upper-class on account of her efforts to stop a child marriage in her village. She went to the police station to lodge a complaint against the offenders but no thorough investigation was launched. To get justice, she took her case to the Trial Court where Court acquitted the accused for the reason of lack of the medical evidence and the reason that they were of a higher social caste and would not be expected to touch or associate with her, who was of a lower social caste.

Thus, women's rights activists and lawyers filed a PIL against the state of Rajasthan in the Supreme Court of India under the banner of Vishaka. This incident revealed the hazards that working women were exposed to on a day-to-day basis and highlighted the urgency for safeguards to be implemented in this regard.

Supreme Court held that sexual harassment includes many things: Unwelcome sexually determined behaviour & demands from male employees at workplace, such as:

- any physical contacts and advances
- sexually coloured remarks
- showing pornography
- passing lewd comments or gestures
- sexual demands by any means
- any rumours/talk at workplace with sexually coloured remarks about a working woman
- spreading rumours about a woman's sexual relationship with anybody

SC recognised that sexual harassment of women at workplace violates the fundamental rights under Article 14, 15, 19 and 21 of the Constitution.

It laid down guidelines and norms to be observed to prevent sexual harassment of working women. These guidelines are applicable to all employers and institutions to prohibit, prevent and redress sexual harassment of women at the workplace.

All employers or persons in charge of work place whether in public or private sector should take appropriate steps to prevent sexual harassment, which are:

- Express prohibition of sexual harassment at the work place should be notified, published and circulated in appropriate ways.
- The rules of government and public sector bodies relating to conduct and discipline should include rules prohibiting sexual harassment and provide for adequate and appropriate penalties against the offender.
- Appropriate work conditions should be provided in respect of work, leisure, health and hygiene to further ensure that there is no hostile environment towards women at work places

- No employee woman should have reasonable grounds to believe that she is disadvantaged in connection with her employment.
- Employees should be allowed to raise issues of sexual harassment at a workers' meeting and in other suitable forum and it should be affirmatively discussed in employer-employee meetings.
- Awareness of the rights of female employees in this regard should be created in particular by prominently notifying the guidelines (and appropriate legislation when enacted on the subject) in a suitable manner.
- Provide a safe working environment to its female employees which include safety from persons they come into contact with at the workplace.
- Where sexual harassment occurs as a result of an act or omission by any third party or outsider, the employer and person in charge will take all steps necessary and reasonable to assist the affected person in terms of support and preventive action.
- Organise orientation programmes for members of the ICC and training programmes to sensitise employees.

The central/state governments are requested to consider adopting suitable measures including legislation to ensure that the guidelines laid down by this order are also observed by the employers in the Private Sector. They are:

Disciplinary action: Where such conduct amounts to misconduct in employment as defined by the relevant service rules, appropriate disciplinary action should be initiated by the employer in accordance with those rules.

Complaint Mechanism: Whether or not such conduct constitutes an offence under law or a breach of the service rules, an appropriate complaint mechanism should be created in the employer's organization for redress of the complaint made by the victim. Such complaint mechanism should ensure time bound treatment of complaints.

Where such conduct amounts to an offence under the IPC or under any other law, the employer shall initiate appropriate action in accordance with law by making a complaint with the appropriate authority.

Internal Complaints Committee:

- All complaints regarding sexual harassment of a woman employee would be dealt by this committee only. Appropriate action in this regard shall be initiated by the employers in accordance with the concerned law.
- Such committee has to be headed by a woman employee only and half of the members of a committee should be comprised of women only.
- Further, to prevent the possibility of any undue pressure or influence from senior levels, such complaints committee should involve a third party, either NGO or other body who is familiar with the issue of sexual harassment.
- The complaint committee must make an annual report to the government department concerned of the complaints and action taken by them.
- The committee would advise and recommend to the victim for the further course of action.

Medha Kotwal Lele & Ors. V. Union of India & Ors.ⁱⁱⁱ

- A letter written by Medha Kotwal highlighted a number of individual cases of sexual harassment stating that the Vishaka Guidelines were not being effectively implemented.
- Converting the letter into a writ petition, the Supreme Court took cognizance and undertook monitoring of implementation of the Vishaka Guidelines across the country by directing State Governments to file affidavits emphasizing on the steps taken by them to implement the Vishaka Guidelines. The result showed a poor performance by a majority of the states.
- Thus, SC issued further orders to national organisations such as the Bar Council of India, to respect and implement the Vishakha Guidelines in spirit.
- In its judgment, the Supreme Court observed that *“the implementation of the Vishaka Guidelines has to be not only in form but also in substance and spirit so as to make available safe and secure environment for women at workplace in every aspect and thereby enabling working women to work with dignity, decency and due respect.”*
- Not being satisfied with the implementation of the Vishaka Guidelines, it directed States to put in place sufficient mechanisms to ensure effective implementation of the

Vishaka Guidelines. Finally, the Supreme Court asserted that in case of a non-compliance or non-adherence of the Vishaka Guidelines, it would be open to the aggrieved persons to approach the respective High Courts.

Mukesh & Anr. vs. State for NCT of Delhi & Ors.^{iv}

- A 23-year-old trainee physiotherapist woman was brutally raped repeatedly by five adult men and a juvenile on the night of 16th December 2012 onto a moving bus in Delhi. She got attacked with an iron rod due to which she had her intestines pulled out. Later, she died.
- The Bench unanimously passed the judgment of Death penalty to all the accused except juvenile. The juvenile who was equally involved in the incident and raped the woman was convicted and sentenced to three years in a reformation center. This incident led to various legislative reforms in rape laws.
- After the incident, a panel was set up under the chairmanship of JS Verma and as per the recommendations, Criminal Law (Amendment) Act, 2013 was passed which provides for the amendment of Indian Penal Code, 1860; Code of Criminal Procedure, 1973, Indian Evidence Act, 1872 and Protection of Children from Sexual Offences Act, 2012 in relation of sexual offences related laws.
- Act widened the scope of rape's definition and provided for capital punishment in rape cases that cause the death of the victim or leave her in a permanent vegetative state. Act also provides for several new offenses to make laws more stringent.

Seema Lepcha vs State of Sikkim and Others^v

SC gave the following directions:

- The state government shall give comprehensive publicity to the notifications and orders issued by it in compliance of the guidelines framed by this court in Vishakha's case and the directions given in Medha's case by getting the same published in the newspapers having maximum circulation in the State after every two months.

- Wide publicity be given every month on Doordarshan, about various steps taken by the state government for implementation of the guidelines framed in Visakha's case and the directions given in Medha's case.
- Social welfare and the Legal Service authority of Sikkim shall also give wide publicity to the notifications and orders issued by the state government not only for the government departments of the state and its agencies but also for the private companies.

Independent Thought vs. Union of India and Anr.

- Independent Thought is an NGO which deals with child rights. It filed a public interest litigation in the Supreme Court of India. It challenged the constitutional validity of exception 2 to section 375 (Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape) of the Indian Penal Code.
- Issues raised were, whether sexual intercourse between a husband and wife, where she is between 15 and 18 years of age would amount to rape and whether section 375, exception 2 is violative of fundamental rights of a girl child?
- In the judgment, Supreme Court has criminalized the sexual intercourse with a minor wife whose age lies between 15 and 18 years. The Court opined that the exception 2 in section 375 is violative of Articles 14, 15 and 21 of the Indian Constitution which allows intrusive sexual intercourse with a girl who is below 18 and above 15 years on the ground of marriage.
- Such exception clause in Indian rape laws negates the very purpose of Prohibition of Child Marriage Act, it violates the provisions of Protection of Children from Sexual Offences Act (POCSO) in context of the age of consent and some other international conventions to which India is a signatory.
- Supreme Court has struck down section 375, exception 2 of the Indian Penal Code. Now, the law cannot protect a man who is engaged in sexual relations with his wife where she is between 15 and 18 years because irrespective of the status of a child whether married or not, she will always remain a child.

Apparel Export Promotion Council v. A.K Chopra^{vi}

- In this case, the Supreme Court upheld the dismissal of a superior officer of the Delhi based Apparel Export Promotion Council who was found guilty of sexually harassing a subordinate female employee at the workplace.
- Supreme Court enlarged the definition of sexual harassment by ruling that physical contact was not essential for it to amount to an act of sexual harassment.
- The Supreme Court explained that “*sexual harassment is a form of sex discrimination projected through unwelcome sexual advances, request for sexual favours and other verbal or physical conduct with sexual overtones, whether directly or by implication, particularly when submission to or rejection of such conduct by the female employee was capable of being used for affecting the employment of the female employee and unreasonably interfering with her work performance and had the effect of creating an intimidating or hostile work environment for her.*”

USA

Barnes v Train (1974)

Barnes v. Train (1974) is commonly viewed as the first sexual harassment case in America, even though the term "sexual harassment" was not used. Paulette Barnes, an African American woman, was a payroll clerk who worked for the Environmental Protection Agency. She brought the case after losing her job for refusing the advances of a male supervisor. The case was dismissed, but was appealed in Barnes v Costle (1977).

Williams v. Saxbe (1976)

In 1976, Williams v. Saxbe was the first case in a U.S. District Court to establish that quid pro quo sexual harassment constitutes sex discrimination under the Civil Rights Act of 1964. A male supervisor was found to have retaliated against Diane R. Williams by firing her after she refused to have sex with him. The court found that it was a form of sex discrimination when a condition of employment is to submit to the sexual advances of a superior. Additionally, there was evidence that other female employees had been subjected to similar conditions. It was

ruled that William B. Saxbe had only required women to submit to his advances, which created an artificial barrier to employment for one gender but not the other.

Williams v Saxbe established a clear-cut type of sexual harassment, quid pro quo, and was the first to establish it in a U.S. District Court. In response to the findings of this case, several earlier decisions against sex discrimination in lower courts were reversed on appeal, including Barnes v Train.

Barnes v. Costle (1977)

Although Barnes v. Train (1974) was initially dismissed, Paulette Barnes won on appeal in Barnes v. Costle (1977). During this case, the District of Columbia Court of Appeals ruled it was sex discrimination for a woman to suffer tangible employment losses (for example losing her job) for refusing to submit to requests for sexual favors. The appeals ruling was based in part on the Williams v. Saxbe (1976) decision. The court also found that companies are liable for not stopping sexual harassment if they know it is being conducted by supervisors. As part of the ruling of Barnes v. Costle, Barnes received around \$18,000 for back pay and the loss of promotions.

Meritor Savings Bank v. Vinson (1986)

In the 1986 case of Meritor Savings Bank v. Vinson, the Supreme Court first recognized "sexual harassment" as a violation of Title VII, established the standards for analyzing whether the conduct was welcome and levels of employer liability, and that speech or conduct in itself can create a "hostile environment". This case filed by Mechelle Vinson ruled that the sexual conduct between the subordinate and supervisor could not be deemed voluntary due to the hierarchical relationship between the two positions in the workplace. Following the ruling of Meritor Savings Bank v. Vinson, reported sexual harassment cases grew from 10 cases being registered by the EEOC per year before 1986 to 624 cases being reported in the subsequent following year. This number of reported cases to the EEOC rose to 2,217 in 1990 and then 4,626 by 1995.

Ellison v. Brady (1991)

The case of Ellison v. Brady resulted in rejecting the reasonable person standard in favor of the "reasonable woman standard" which allowed for cases to be analyzed from the perspective of the complainant and not the defendant.

Jenson v. Eveleth Taconite Co. (1991)

Also in 1991, Jenson v. Eveleth Taconite Co. became the first sexual harassment case to be given class action status paving the way for others.

Seven years later, in 1998, through that same case, new precedents were established that increased the limits on the "discovery" process in sexual harassment cases, that then allowed psychological injuries from the litigation process to be included in assessing damages awards.

Faragher v. City of Boca Raton, Florida, and Burlington v. Ellerth (1998)

In the same year, the courts concluded in Faragher v. City of Boca Raton, Florida, and Burlington v. Ellerth, that employers are liable for harassment by their employees.

Oncala v. Sundowner Offshore Services (1998)

Moreover, Oncala v. Sundowner Offshore Services set the precedent for same-sex harassment, and sexual harassment without motivation of "sexual desire", stating that any discrimination based on sex is actionable so long as it places the victim in an objectively disadvantageous working condition, regardless of the gender of either the victim, or the harasser.

Burlington Northern & Santa Fe Railway Co. v. White (2006)

In the 2006 case of Burlington Northern & Santa Fe Railway Co. v. White, the standard for retaliation against a sexual harassment complainant was revised to include any adverse employment decision or treatment that would be likely to dissuade a "reasonable worker" from making or supporting a charge of discrimination.

Astra USA v. Bildman (2009)

In Astra USA v. Bildman, applying New York's faithless servant doctrine, the court held that a company's employee who had engaged in financial misdeeds and sexual harassment must "forfeit all of his salary and bonuses for the period of disloyalty." The court held that this was

the case even if the employee "otherwise performed valuable services," and that the employee was not entitled to recover restitution for the value of those other services.

Reeves v. C.H. Robinson Worldwide, Inc. (2010)

The 2010 case, *Reeves v. C.H. Robinson Worldwide, Inc.* ruled that a hostile work environment can be created in a workplace where sexually explicit language and pornography are present. A hostile workplace may exist based upon the treatment of employees as a group, even if it is not targeted at any particular employee.

Reed v. Reed^{vii}

In this case, the Court abolished the practice of giving preference to a male over a female pertaining to administration of estates.

In the case of **Frontiero v. Richardson^{viii}**, the Court struck down the discrimination against husbands of service woman who till then were not entitled to receive medical benefits unlike wives of servicemen and stated that fitness cannot be a ground of discrimination in directing a policy as health issues are not restricted to women.

In light of the above, it is pertinent to note that the judiciary of both India and United States of America have made significant efforts to curb and eradicate discrimination on the basis of gender.

SUGGESTIONS

In light of the above article, it is explicitly clear that both India and the United States of America have constantly endeavoured to attain gender equality by way of judicial precedents and by incorporating various Legislations. Civilization has come a long way and staunch patriarchy no more rules the society. The propagation of feminism has removed various barbaric practices and social taboos. In today's modernised world we see women leading the way in many spheres of life like politics, business, social activism, sports and the list is endless.

However, toxic masculinity often undermines the importance of a woman in the society and such dominance or rather toxic chauvinism can be seen in the form of rapes and woman being restricted to the four corners of the house.

Inducting specific courses in the education system of various nations can be considered in order to educate the men and the society as a whole pertaining to the qualities of a woman. Education has always played the pivotal role in shaping up the psyche of the society. Therefore, my suggestion would be to induct courses regarding gender equality in schools, colleges, offices and every other realm of the society where men and women coexist.

ENDNOTES

ⁱ IMPORTANT CONSTITUTIONAL AND LEGAL PROVISIONS FOR WOMEN IN INDIA,12, http://mospi.nic.in/sites/default/files/reports_and_publication/cso_social_stactices_division/Constitutional&Legal_Rights.pdf

ⁱⁱ AIR 1997 SC 3011

ⁱⁱⁱ (2013) 1 SCC 311

^{iv} (2017) 6 SCC 1

^v (2013) 11 SCC 647

^{vi} (1999) 1 SCC 759

^{vii} 404 U.S. 71 (1971)

^{viii} 411 U.S. 677 (1973)