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Indian Constitutional Feminism: A Comparative Study

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ABSTRACT

Indian constitutional feminism offers a distinctive lens through which to examine the role of legal frameworks in advancing gender equality. The Indian Constitution provides significant protections and guarantees for women's rights through provisions such as Articles 14, 15 and 16, which secure equality before the law and prohibit discrimination on the ground of sex. In practice, however, these protections are often undermined by religious personal laws, socio-economic inequality and patriarchal norms. This study compares Indian constitutional feminism with other national frameworks: the United States, where gender equality depends largely on judicial interpretation in the absence of explicit constitutional guarantees; South Africa, which commits robustly to gender rights through express constitutional provisions and gender equality institutions; and the Nordic countries, which integrate gender equality directly into constitutional and societal norms. The Indian model reflects both progressive ideals and significant challenges. Judicial activism has played a crucial role in advancing women's rights, as the Vishaka guidelines and the invalidation of instant triple talaq illustrate, but legal reform is often met with resistance grounded in cultural and religious tradition. Intersectional questions of caste, class and the rural-urban divide further expose the limits of constitutional feminism in addressing the needs of all women. This comparative study reveals that while India's constitutional framework for gender equality is among the most progressive in the Global South, its implementation is hindered by deep-seated cultural practices and legal complexity. The study highlights the need for reforms that not only advance legal rights but also address the socio-cultural factors that prevent Indian women from fully realising their constitutional freedoms.

Keywords: Constitution, Feminism, Judicial Activism, Constitutional Goals, Gender Equality

I. INTRODUCTION

“The Constitution of the United States is not a mere lawyers’ document: it is a vehicle of life, and its spirit is always the spirit of the age.” Woodrow Wilson¹

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¹ WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES ch. III (1908). The sentence is widely attributed in India to Dr. B.R. Ambedkar and presented as a remark on the Constitution of India. It does not

Women have been vulnerable across communities because they were regarded as subordinate citizens. Their deprivation contrasts sharply with an otherwise evolving environment in which social change has not kept pace with technology. Pervasive gender bias has become a worldwide problem that violates human rights and human dignity. Human rights bodies and feminist groups have been paving the road to women's emancipation since the middle of the twentieth century. Human rights, democracy, development and fundamental freedoms are interconnected and mutually reinforcing. The condition of women around the world today reflects the extent to which the full development of individuality, fundamental freedoms and equal participation by women in political, economic, social and cultural life have been realised. That is one side of the coin.

On the other hand, although the standing of women has improved globally in recent decades, gender equality is still not expected to be achieved by 2030.² Sexual exploitation and abuse, the inequitable distribution of unpaid care and domestic work, and adverse perceptions in public and private employment remain significant barriers. If current trends continue, it is estimated that three hundred years will be needed to end child marriage, two hundred and eighty-six years to close gaps in legal protection and remove discriminatory laws, one hundred and forty years for women to be represented equally in positions of power and leadership in the workplace, and forty-seven years to achieve equal representation in national parliaments.³ International commitments to advance gender equality have produced improvements in certain areas, including recent declines in child marriage and female genital mutilation. The aspiration of a society in which all women and girls may pursue their goals on the same terms as men has not yet been realised.

Women are nonetheless better represented in politics than in many other fields. Since 1960 only a small number of States have had a woman in the highest executive office, though the number has risen gradually, with the most rapid increase occurring in the last fifteen years.⁴ The first was Sirimavo Bandaranaike, who became Prime Minister of Ceylon in 1960.⁵ The pattern of

appear in the CONSTITUENT ASSEMBLY DEBATES, and the attribution to Ambedkar is mistaken.

² UNITED NATIONS, GOAL 5: GENDER EQUALITY, <https://www.un.org/sustainabledevelopment/gender-equality/> (last visited Nov. 15, 2024) ("There has been progress over the last decades, but the world is not on track to achieve gender equality by 2030.").

³ *Id.* The underlying projections are those of UN WOMEN & UN DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, PROGRESS ON THE SUSTAINABLE DEVELOPMENT GOALS: THE GENDER SNAPSHOT 2023 (Sept. 7, 2023).

⁴ Aaron O'Neill, *Number of Countries with Women in Highest Position of Executive Power 1960-2024*, STATISTA (Sept. 12, 2024). Counts vary with the definition adopted: Statista recorded sixty-two States since 1960, while the PEW RESEARCH CENTER counted sixty United Nations member States when the enquiry is confined to heads of government. See PEW RESEARCH CENTER, WOMEN LEADERS AROUND THE WORLD (Oct. 3, 2024).

⁵ Sirimavo Bandaranaike took office on 21 July 1960 as Prime Minister of Ceylon, which was renamed Sri Lanka in 1972. She was not herself returned at the election; her party having won, a seat in the Senate was vacated so that she could take office.

recent years illustrates how precarious such representation remains: Mexico elected its first woman President in 2024, while two long-serving women leaders, in Iceland and in Bangladesh, left office in the same year.⁶ Even at its highest, the number of States led by a woman in any single year has remained a small fraction of the number led by men.

Worldwide, a substantial proportion of married women lack decision-making power over their sexual and reproductive health and rights, and more than a third of women between fifteen and forty-nine years of age have experienced physical or sexual intimate partner violence, or non-partner sexual violence.⁷ Female genital mutilation and cutting remains concentrated in some thirty countries across Africa, the Middle East and Asia, where it carries a high risk of prolonged bleeding, infection, complications in childbirth, infertility and death.⁸ This form of violence does not harm individual women and girls alone; it also undermines their quality of life and hinders their active involvement in society.

In formal legal terms, Indian law places women on an equal footing with men. Substantive gender equality nevertheless remains to be achieved in many respects. According to the Global Gender Gap Index published by the World Economic Forum,⁹ India had closed 64.1 per cent of its gender gap in 2024, giving it an overall rank of 129 among the 146 economies surveyed, marginally below its 2023 rank of 127 and ahead of only the Maldives and Pakistan within Southern Asia.¹⁰ Gender equality is not only a fundamental human right; it is also the foundation of a peaceful, prosperous and sustainable world. In pursuing the constitutional goal of equality, and in fulfilment of India's international commitments, the courts in India have played a vital role.

Against that background, this paper examines the status of Indian women by reference to constitutional goals and judicial activism, and compares that status with the position of women in other States.

⁶ Katrin Jakobsdottir resigned as Prime Minister of Iceland in April 2024 in order to contest the presidency, which she did not win. Sheikh Hasina left office in Bangladesh in August 2024 amid a mass uprising; whether she executed a formal resignation remains disputed, the President of Bangladesh having stated in October 2024 that he had no documentary evidence of a resignation letter. Claudia Sheinbaum was elected President of Mexico in June 2024 and took office in October 2024.

⁷ UNITED NATIONS (n 2). The Goal 5 page records that 43.7 per cent of married women lack decision-making power over their sexual and reproductive health and rights, and that 35 per cent of women between 15 and 49 years of age have experienced physical or sexual intimate partner violence or non-partner sexual violence.

⁸ WORLD HEALTH ORGANIZATION, FEMALE GENITAL MUTILATION (Jan. 31, 2025) ("More than 230 million girls and women alive today have undergone female genital mutilation (FGM) in 30 countries in Africa, the Middle East and Asia where FGM is practiced.").

⁹ The Global Gender Gap Index benchmarks the state and evolution of gender parity across four dimensions: economic participation and opportunity, educational attainment, health and survival, and political empowerment. First published in 2006, it is the longest-standing index tracking progress towards closing these gaps over time.

¹⁰ WORLD ECONOMIC FORUM, GLOBAL GENDER GAP REPORT 2024 (June 2024), https://www3.weforum.org/docs/WEF_GGGR_2024.pdf.

A. Feminism

Drawing largely on women's experiences, feminism is a set of social ideas, political movements and moral philosophies which, from competing and sometimes contradictory viewpoints, address injustices in society, politics and the economy. Across its history, liberal, radical, socialist, cyber and global or contemporary feminist theories have each sought to articulate the vulnerability of women. Feminism is, in short, a social movement that aims to end gender inequality and oppression and to achieve gender equality in law and in practice.

B. Constitutional feminism

The modern conception of the democratic welfare State endorses gender equality through its constitutional goals. The supreme law of the land should address the issues and challenges faced by women by encouraging the entire legal system to take a more proactive approach to their protection. Constitutional feminism may accordingly be understood as the study of the relationship between feminist theory and a country's constitution. It recognises that constitutions affect women at every stage of life. The Indian Constitution is a collection of core principles and codified rules that support gender equality. Equality entails treating men and women alike in all circumstances, unless there is a demonstrable and intelligible difference between them.

C. Research questions

What constitutional provisions give effect to the concept of feminism?

How far have the courts in India succeeded in implementing a constitutional feminist philosophy within the country's diverse cultures and personal laws?

Is the status of Indian women on a par with that of women in the United States of America, South Africa and the Nordic countries?

D. Scope and methodology

This paper is based on a doctrinal and comparative methodology. It examines the constitutional feminism of India alongside other national frameworks: South Africa, which has a strong commitment to gender rights through explicit constitutional provisions and gender equality institutions; the United States, where gender equality depends largely on judicial interpretation because express constitutional guarantees are absent; and the Nordic countries, which incorporate gender equality into their constitutional arrangements and social standards.

The scope of the study is to examine the Indian Constitution with reference to the concept of feminism, and to compare it with the position in the United States, South Africa and the Nordic countries in order to identify the present position of Indian women.

E. Review of literature

Shreya Atrey's study of feminist constitutionalism maps the discourse as one in contestation.¹¹ Against a long history of gender jurisprudence that reveals a rich and complex past, and which cannot easily be dismissed or applauded, she questions the tendency to label a recent wave of favourable rulings of the Supreme Court of India as definitively feminist. Her work demonstrates the kind of discourse analysis from which feminist constitutionalism may benefit.

The collection edited by Sibyl A. Schwarzenbach and Patricia Smith treats the Constitution of the United States as a living document capable of changing to accommodate women and their concerns, and traces its struggle to shed the burden of a two-hundred-year-old past.¹²

F. Significance of the study

The study assists in understanding and analysing the concept of feminism in the Indian Constitution, and how far these constitutional goals may be said to have been achieved through judicial activism. It is also of use in identifying the contemporary position of Indian women within a diverse culture by reference to the position of women in other States.

II. FEMINIST PHILOSOPHY IN THE INDIAN CONSTITUTION

India is a land of diverse cultures with a system of personal laws. Despite the range of traditions, customs and religious beliefs, the framers of the Constitution intended to bring all Indians within a single constitutional thread. In most cultures women have been treated as subordinate to men. To eliminate such practices and the perceptions that sustain them, and keeping in view the discrimination historically faced by the weaker sections, the framers conferred certain protections on women in order to achieve gender equality and to empower them.

The Constitution accordingly proscribes discriminatory practices, secures to women equal opportunity in all spheres, and facilitates the pursuit of their goals. Equality is reflected in the Preamble, in the fundamental rights, and in the directive principles of State policy. In addition to upholding women's rights, the Constitution directs the State to frame policies that promote the equal treatment and empowerment of women.

¹¹ Shreya Atrey, *Feminist Constitutionalism: Mapping a Discourse in Contestation*, 20 INT'L J. CONST. L. 611 (2022), doi:10.1093/icon/moac029.

¹² SIBYL A. SCHWARZENBACH & PATRICIA SMITH, EDS., *WOMEN AND THE U.S. CONSTITUTION: HISTORY, INTERPRETATION, AND PRACTICE* (2003).

Equality before the law and the equal protection of the laws,¹³ the prohibition of discrimination on grounds of religion, race, caste, sex or place of birth,¹⁴ equality of opportunity in matters of public employment,¹⁵ the right of men and women equally to an adequate means of livelihood,¹⁶ the distribution of the ownership and control of the material resources of the community so as best to subserve the common good,¹⁷ equal pay for equal work for men and women,¹⁸ and the provision for just and humane conditions of work and for maternity relief¹⁹ are all of particular importance to gender equality. The Constitution also makes it a fundamental duty to renounce practices derogatory to the dignity of women.²⁰

Given these provisions, feminist litigants and lawyers have worked to overcome the social barriers that impair women's ability to exercise their legal rights, irrespective of caste, creed or religion. Against a long and complex history of gender jurisprudence, the Supreme Court of India has in recent years issued a number of rulings favourable to women, particularly on domestic violence, workplace harassment, unequal treatment at work, reproductive rights and personal law. Whether that body of decisions is properly described as feminist is itself a matter of scholarly contestation.²¹

III. JUDICIAL ACTIVISM IN THE IMPLEMENTATION OF CONSTITUTIONAL GOALS

The most common manifestation of male chauvinism is violence against women, which occurs in all societies. Many women have been victims of family violence committed in the name of marriage. In order to shield married women from cruelty at the hands of their husbands and their husbands' relatives, Parliament amended the Indian Penal Code and inserted two crucial provisions, sections 304-B and 498-A.²² It subsequently became clear that this legislation was insufficient to safeguard women in every aspect of their daily lives. Until 2005 the remedies available to victims of domestic abuse were limited: a woman had either to seek a divorce in a civil court or to set the criminal law in motion under section 498-A or section 304-B. In neither

¹³ INDIA CONST. art. 14.

¹⁴ INDIA CONST. art. 15(1). Article 15(3) further empowers the State to make special provision for women and children, and is the textual basis of protective legislation.

¹⁵ INDIA CONST. art. 16.

¹⁶ INDIA CONST. art. 39(a).

¹⁷ INDIA CONST. art. 39(b).

¹⁸ INDIA CONST. art. 39(d).

¹⁹ INDIA CONST. art. 42.

²⁰ INDIA CONST. art. 51-A(e).

²¹ Atrey (n 11).

²² Section 498-A was inserted in the Indian Penal Code, 1860, by the Criminal Law (Second Amendment) Act, 1983 (Act 46 of 1983), to punish cruelty inflicted on a married woman by her husband or his relatives. Section 304-B, creating the offence of dowry death, was inserted by the Dowry Prohibition (Amendment) Act, 1986 (Act 43 of 1986). Both provisions have since been replaced, in substantially the same terms, by ss. 85 and 80 respectively of the Bharatiya Nyaya Sanhita, 2023, in force from 1 July 2024.

case could she obtain emergency relief, and relationships outside marriage were not recognised at all. For these reasons many women endured their suffering in silence. Parliament therefore enacted the Protection of Women from Domestic Violence Act.²³

The Act's key objective is to protect women against violence within a domestic relationship. It is innovative legislation directed solely at the protection of women, irrespective of their relationship to the respondent, and as originally enacted it confined the category of respondent to adult males; that limitation has since been removed, so that a respondent may now be a man or a woman.²⁴ The Act's definition of an aggrieved person is broad enough to include a woman living in a relationship in the nature of marriage with a partner of her choice. In *D. Velusamy v. D. Patchaiammal*²⁵ Katju and Thakur, JJ., laid down a set of criteria for determining which relationships are to be classified as "relationships in the nature of marriage" for the purposes of section 125 of the Code of Criminal Procedure, 1973, and of the Act of 2005.

The Court equated the expression "relationship in the nature of marriage" with a common-law marriage. That interpretation excluded from legal remedies women in a variety of cohabiting relationships, and particularly vulnerable women in fraudulent marriages or in the position of a second wife.

The principal question in the case was whether an unmarried woman who lives with a man and is later abandoned by him may sue him for maintenance. According to the Court, a relationship in the nature of marriage may be compared to a common-law marriage, but not every arrangement of that kind would qualify. To fall within the expression, and so to secure the benefit of maintenance under the Act, the parties must hold themselves out to society as being akin to spouses; must be of legal age to marry; must otherwise be qualified to enter into a legal marriage, including being unmarried; and must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time.²⁶ The Act of 2005 thus assists unmarried women as well as married women.

In *Vishaka v. State of Rajasthan*²⁷ a bench of Verma, C.J., and Sujata V. Manohar and Kirpal, JJ., issued guidelines to which establishments were required to adhere in handling accusations of sexual harassment. The case arose on a writ petition following the alleged gang rape of a social worker in a village in Rajasthan. The Court held that such conduct violated the

²³ The Protection of Women from Domestic Violence Act, 2005 (Act 43 of 2005), brought into force on 26 October 2006.

²⁴ The words "adult male" in s. 2(q) of the Act, which had confined the category of respondent to men, were struck down as violative of Article 14 in *Hiral P. Harsora v. Kusum Narottamdas Harsora*, (2016) 10 SCC 165.

²⁵ *D. Velusamy v. D. Patchaiammal*, (2010) 10 SCC 469.

²⁶ *Velusamy* (n 25), at para. 33.

²⁷ *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241, AIR 1997 SC 3011.

fundamental rights guaranteed by Articles 14, 15 and 21, and that a further consequence was the infringement of the victim's right under Article 19(1)(g) to practise any profession or to carry on any occupation, trade or business. The guidelines laid down in 1997 were to operate until suitable legislation was enacted. Parliament has since done so: the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, affords a statutory remedy to women who are harassed at work and who might otherwise be unable to voice their grievances.²⁸

In *Secretary, Ministry of Defence v. Babita Puniya*²⁹ Chandrachud and Rastogi, JJ., cleared the path for gender equality in the armed forces by directing that permanent commissions be granted to women officers of the Indian Army. The reasoning was applied to the Indian Navy in a separate decision delivered a month later.³⁰ The Court observed that denying women officers permanent commissions was a plain infraction of the fundamental right guaranteed by Article 14. It further noted that although Article 33 permits the restriction of fundamental rights in their application to the armed forces, such restrictions may be imposed only to the extent required to ensure the proper discharge of duties and the maintenance of discipline.³¹ The decision has established a standard for according women in the Army opportunities and treatment equal to those of their male colleagues.

A three-judge bench of Chandrachud, Bopanna and Pardiwala, JJ., held in *X v. Principal Secretary, Health and Family Welfare Department, Government of NCT of Delhi*³² that the Medical Termination of Pregnancy Act, 1971, extends to unmarried women the right to a safe and lawful abortion. The bench held that there was no justification for denying unmarried women access to Rule 3B of the Medical Termination of Pregnancy Rules, which permits termination between twenty and twenty-four weeks for specified categories of women.³³ A woman who becomes pregnant and whose marital status then changes must, the Court held, be covered by Rule 3B.

According to the Court, it is contrary to Article 14, which guarantees equality before the law, to forbid unmarried women from obtaining an abortion while permitting married women to do so

²⁸ The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (Act 14 of 2013), received the assent of the President on 22 April 2013 and was brought into force on 9 December 2013.

²⁹ *Secretary, Ministry of Defence v. Babita Puniya*, (2020) 7 SCC 469 (decided 17 Feb. 2020).

³⁰ *Union of India v. Lt. Cdr. Annie Nagaraja*, (2020) 13 SCC 1 (decided 17 Mar. 2020), applying the same reasoning to the Indian Navy.

³¹ INDIA CONST. art. 33; *Babita Puniya* (n 29).

³² *X v. Principal Secretary, Health & Family Welfare Department, Government of NCT of Delhi*, 2022 SCC OnLine SC 1321 (decided 29 Sept. 2022).

³³ Rule 3B of the Medical Termination of Pregnancy Rules, 2003, as substituted by the Medical Termination of Pregnancy (Amendment) Rules, 2021, permits specified categories of women to terminate a pregnancy of up to twenty-four weeks' gestation.

within the same gestational period. In construing the scope of Rule 3B(c) the Court adopted a purposive approach that brought unmarried women within its terms, and in doing so broadened the scope of Article 21 by upholding the autonomy of unmarried women to access safe abortion services.

In *Joseph Shine v. Union of India*³⁴ the Supreme Court declared that section 497 of the Indian Penal Code, which made adultery a crime, was unconstitutional as violating Articles 14, 15 and 21. The five-judge bench comprised Dipak Misra, C.J., and Nariman, Khanwilkar, Chandrachud and Indu Malhotra, JJ. The Court described the provision as an instance of patriarchal custom, pointing out that it reinforced gender inequality by effectively placing the husband in the position of a master. It further held that section 198(2) of the Code of Criminal Procedure, which permitted only a husband to prosecute his wife's partner, was manifestly arbitrary in its application to the offence of adultery.³⁵ In invalidating these provisions the Court emphasised the need for law that respects equality and individual dignity rather than restating antiquated gender norms.

In *Shayara Bano v. Union of India*³⁶ the principle of equality was affirmed by a bench of Khehar, C.J., and Kurian Joseph, Nariman, Lalit and Abdul Nazeer, JJ. The Court considered whether talaq-e-biddat, or instant triple talaq, was protected by Article 25(1), which guarantees the freedom to profess, practise and propagate religion, and whether the practice was an essential feature of Islamic doctrine. By a majority of three to two the Court set aside the practice, although the judges in the majority reasoned differently.³⁷ The minority would have suspended the practice for six months and invited Parliament to legislate; those directions did not form part of the order of the Court.³⁸ The decision established a standard for striking a balance between gender justice and religious freedom.

Since the adoption of the Constitution the courts in India have been concerned with the principles of equality and non-discrimination, and have pursued the goals of the framers through

³⁴ *Joseph Shine v. Union of India*, (2019) 3 SCC 39, AIR 2018 SC 4898.

³⁵ *Joseph Shine* (n 34). The Court delivered four separate concurring opinions rather than a single judgment. Section 198(2) of the Code of Criminal Procedure, 1973, was declared unconstitutional only to the extent that it applied to the offence under s. 497 of the Indian Penal Code; the provision survives in its application to s. 498.

³⁶ *Shayara Bano v. Union of India*, (2017) 9 SCC 1, AIR 2017 SC 4609 (decided 22 Aug. 2017).

³⁷ *Shayara Bano* (n 36). The three judges in the majority did not share a single line of reasoning. Nariman and Lalit, JJ., held talaq-e-biddat to be manifestly arbitrary and therefore violative of Article 14; Kurian Joseph, J., expressly declined to follow that route and held instead that what is bad in theology cannot be good in law. There is accordingly no common ratio among them.

³⁸ *Shayara Bano* (n 36) (Khehar, C.J., and Nazeer, J., dissenting). The six-month injunction and the direction to the Union to consider legislation were directions proposed under Article 142 in the minority opinion. They did not form part of the order of the Court and have no operative effect; the Order records only the setting aside of talaq-e-biddat by a majority of 3:2.

what may be called constitutional feminism, in a line of cases running from *C.B. Muthamma v. Union of India*³⁹ to *X v. Principal Secretary*.⁴⁰

IV. THE STATUS OF WOMEN IN THE UNITED STATES OF AMERICA

Women's rights are not specifically protected by the Constitution of the United States. Sex discrimination would be expressly forbidden by the Equal Rights Amendment, a proposed amendment first introduced in Congress in December 1923 and submitted to the States in 1972.⁴¹ Campaigners maintain that the amendment has satisfied every legal prerequisite for adoption and that the federal government has nonetheless refused to acknowledge it as the Twenty-Eighth Amendment; that position is contested, and the Archivist of the United States has declined to certify the amendment on the footing that the ratification period expired.⁴² The Fourteenth Amendment, ratified in 1868, guarantees the equal protection of the laws rather than a substantive guarantee of equal rights, while the Nineteenth Amendment, which secured women's voting rights, was a significant advance.⁴³

In *Leser v. Garnett*⁴⁴ the Supreme Court unanimously upheld the validity of the Nineteenth Amendment against a challenge to the registration of two women as voters in Baltimore, holding that the amendment had been duly ratified and that the Secretary of State's proclamation to that effect was conclusive upon the courts. From that point onwards numerous cases were decided which sought to secure equality for women in the United States.

In *United States v. Virginia*⁴⁵ the Supreme Court held that the male-only admissions policy of the Virginia Military Institute was unconstitutional. In failing to advance an "exceedingly persuasive justification" for that policy, Virginia had violated the equal protection guarantee of the Fourteenth Amendment. A State must have a very strong case for adopting a gender-based

³⁹ *C.B. Muthamma v. Union of India*, (1979) 4 SCC 260, AIR 1979 SC 1868.

⁴⁰ *X* (n 32).

⁴¹ The Equal Rights Amendment was first introduced in Congress in December 1923. It was approved by the House of Representatives in 1971 and by the Senate in March 1972 and submitted to the States with a seven-year ratification deadline, later extended to 1982. Nevada ratified in 2017, Illinois in 2018 and Virginia on 27 January 2020, purportedly completing the thirty-eight ratifications required by Article V.

⁴² Shivangi Misra, *Why Women's Rights Are Vulnerable in America*, EQUALITY NOW (Mar. 8, 2024) ("Since the ERA was proposed over 100 years ago, it has met all the legal requirements for its adoption. However, despite decades of advocacy, the US Government has refused to recognize it as the 28th amendment to the Constitution."). That position is contested rather than settled. The Office of Legal Counsel concluded to the contrary in *Ratification of the Equal Rights Amendment*, 44 Op. O.L.C. 1 (2020), that the ratification deadline was valid and that the amendment is no longer pending before the States; the Archivist of the United States has declined to certify on that basis; and the federal courts have twice declined to compel certification, in *Virginia v. Ferriero*, 525 F. Supp. 3d 36 (D.D.C. 2021), and *Illinois v. Ferriero*, 60 F.4th 704 (D.C. Cir. 2023).

⁴³ U.S. CONST. amend. XIV (ratified 1868); U.S. CONST. amend. XIX (ratified 1920).

⁴⁴ *Leser v. Garnett*, 258 U.S. 130 (1922).

⁴⁵ *United States v. Virginia*, 518 U.S. 515 (1996).

classification, and the justification must not rest on oversimplified assumptions about the fundamental differences between the sexes.⁴⁶

In *Roe v. Wade*⁴⁷ the Court held that the right to obtain an abortion was protected by the Constitution. In treating the underlying right of privacy as fundamental, the ruling invalidated numerous abortion laws and required that challenged abortion regulations be assessed against a compelling state interest, the highest threshold of judicial review in the United States.

In *Dobbs v. Jackson Women's Health Organization*⁴⁸ the Supreme Court overruled *Roe v. Wade* after forty-nine years. Mississippi's Gestational Age Act provided that a person shall not intentionally or knowingly perform or induce an abortion of an unborn human being if the probable gestational age of the unborn human being has been determined to be greater than fifteen weeks, except in a medical emergency or in the case of a severe fetal abnormality. The respondents, an abortion clinic and one of its doctors, challenged the Act in the Federal District Court, arguing that it contravened the decisions establishing a constitutional right to an abortion, particularly *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁴⁹

Having found that the fifteen-week restriction was inconsistent with decisions forbidding States to prohibit abortion before viability, the District Court granted summary judgment for the respondents and permanently enjoined the enforcement of the Act. The Supreme Court reversed, holding that by the time the Due Process Clause was adopted in 1868 a substantive right to an abortion was neither deeply rooted in the Nation's history and tradition nor regarded as a right. Federal constitutional protection for the right was thereby withdrawn.

V. THE STATUS OF WOMEN IN SOUTH AFRICA

For a long period South African women were treated as second-class citizens subject to the social and, in some respects, legal authority of their fathers or husbands. Black women were at a twofold disadvantage on account of both gender and race. The law in all its forms contributed significantly to that prejudice. Black women, for instance, were not entitled to property or to rights over their children because they were regarded as minors under customary law, while at common law white women were denied guardianship and economic rights.⁵⁰ South Africa's

⁴⁶ *United States v. Virginia* (n 45). The judgment was that of the Supreme Court of the United States, by seven votes to one, Ginsburg, J., delivering the opinion of the Court. The Court of Appeals for the Fourth Circuit had accepted Virginia's proposal to retain the Institute as a male-only college and to establish a separate programme for women; the Supreme Court rejected that remedy as constitutionally inadequate.

⁴⁷ *Roe v. Wade*, 410 U.S. 113 (1973).

⁴⁸ *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

⁴⁹ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

⁵⁰ For a judicial account of the legal disabilities historically imposed on married women in South Africa, see *Brink v. Kitshoff* NO 1996 (4) SA 197 (CC) (O'Regan, J.).

journey towards gender equality has therefore been protracted and difficult, and during the apartheid era Black women in particular faced severe oppression and discrimination.

Apartheid ended in 1994, and a new era began in which the rights of all citizens, regardless of gender, were upheld and advanced. The adoption of the Constitution in 1996⁵¹ set a precedent for safeguarding women's rights and made it possible for a series of statutes addressing gender issues to be enacted. Gender equality is today an essential component of an egalitarian and democratic society. Section 9 of the Constitution guarantees the right to equality and expressly forbids discrimination on the ground of gender.

Women are protected by the full range of rights guaranteed in the Constitution, including the rights to life, privacy and dignity, but the particular protection they are afforded is that of equality.

Section 9(3) provides that the State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.⁵²

The provision prohibits discrimination on the grounds of gender, sex, pregnancy and marital status in order to prevent harm to women, and the inclusion of both the social category of gender and the biological category of sex makes it clear that no unfair discrimination is permitted on the basis of any aspect of being a woman. That principle secures to women the same legal standing and protections as men.

Despite this constitutional commitment, South African women, and Black women in particular, continue to face economic disadvantage. They make up a disproportionate share of the unemployed and are more likely to work in lower-paying occupations, including agricultural and domestic work, and they are frequently paid less than men for the same work. They also contend with high rates of domestic violence and rape.⁵³

There have nonetheless been resolute efforts to bridge the gap, and legislation has been crucial to that endeavour. South Africa's commitment to gender equality is demonstrated by the legal framework put in place to protect and promote women's rights, in particular the Employment

⁵¹ CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996, adopted by the Constitutional Assembly on 8 May 1996, certified on 4 December 1996 and in force from 4 February 1997.

⁵² CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996, s. 9(3).

⁵³ The author cited for this passage a commercial legal-information page that is no longer reachable at the address given. The proposition is retained because South Africa's continuing gender disparities in employment and earnings are independently recorded in WORLD ECONOMIC FORUM (n 10), which ranks South Africa eighteenth of 146 economies overall while scoring it substantially lower on economic participation and opportunity.

Equity Act, the Domestic Violence Act and the Promotion of Equality and Prevention of Unfair Discrimination Act, which together seek to ensure that women can live without abuse, discrimination or inequity.⁵⁴ Although significant progress has been made, further effort is required if the aim of a society in which all women are respected and empowered is to be achieved.

The following decisions reflect South Africa's commitment to addressing the historical struggle of women in society.

A. *Brink v. Kitshoff NO*

The Constitutional Court held that section 44 of the Insurance Act of 1943 infringed the equality clause by discriminating against married women on the grounds of sex and marital status.⁵⁵ The provision excluded some or all of the benefits of life insurance policies ceded to or made in favour of married women by their husbands, while married men remained entitled to the benefit of policies made over to them by their wives. The contention that the provision operated for the benefit of married women could no longer be sustained, the common-law rule prohibiting donations between spouses having been abolished.⁵⁶ The Court also rejected the argument that the provision was needed to prevent collusion between spouses, reasoning that such collusion could as readily occur where husbands rather than wives were the beneficiaries. Sections 44(1) and 44(2) were declared invalid, the invalidity operating with effect from 27 April 1994.⁵⁷

B. *Daniels v. Campbell NO*

The Constitutional Court held that persons married in accordance with Muslim rites are spouses for the purposes of inheriting from, or making a claim against, the estate of a person who dies without leaving a will.⁵⁸ The applicant, Mrs. Daniels, married her husband in accordance with Muslim rites in 1977. The marriage was not solemnised under the civil law. On her husband's intestate death in 1994 the home they shared fell into his estate, and the applicant was informed that she was not a surviving spouse and could not inherit. The High Court held that the word "spouse" could refer only to persons married under South African civil law, and, in order to

⁵⁴ Employment Equity Act 55 of 1998; Domestic Violence Act 116 of 1998; Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

⁵⁵ *Brink v. Kitshoff NO* (CCT 15/95) [1996] ZACC 9, 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC) (15 May 1996).

⁵⁶ *Brink* (n 55). The common-law rule prohibiting donations between spouses had been abolished by s. 22 of the Matrimonial Property Act 88 of 1984.

⁵⁷ *Brink* (n 55). The Court declared ss. 44(1) and 44(2) of the Insurance Act 27 of 1943 invalid on 15 May 1996 and ordered, under s. 98(6)(a) of the interim Constitution, that the invalidity operate with effect from 27 April 1994, the date on which the interim Constitution (Act 200 of 1993) commenced.

⁵⁸ *Daniels v. Campbell NO* (CCT 40/03) [2004] ZACC 14, 2004 (5) SA 331 (CC), 2004 (7) BCLR 735 (CC) (11 Mar. 2004).

grant the applicant relief, ordered that words be read into the Maintenance of Surviving Spouses Act and the Intestate Succession Act. On appeal Sachs, J., held instead that the word “spouse” already encompassed parties to a Muslim marriage, that it was unnecessary to read anything into the statutes, and that since their purpose was to protect widows there was no reason why the equitable principles underpinning them should not apply to Muslim survivors.⁵⁹

VI. THE STATUS OF WOMEN IN THE NORDIC COUNTRIES

Gender equality is protected by robust legal frameworks and anti-discrimination statutes in the five Nordic countries of Denmark, Finland, Iceland, Norway and Sweden. These States do not merely support gender equality as a policy goal. In order to position themselves as international leaders in women’s rights, they also draw increasingly on their own histories, and on more recent understandings at the international level according to which the Nordic countries are regarded as especially gender-equal.⁶⁰

The Nordic countries were among the first in the world to enact general gender-equality and anti-discrimination legislation.⁶¹ They have high rates of female employment and numerous initiatives to support women in reconciling work and family obligations. They were also early parties to the Convention on the Elimination of All Forms of Discrimination Against Women, the international bill of women’s rights, although the extent to which the Convention has been incorporated into domestic law varies considerably between them.⁶² As of 2023 the Global Gender Gap Index was led by Iceland, Norway, Finland, New Zealand and Sweden.⁶³

Women remain underrepresented in senior positions in the private sector, notwithstanding significant legislative protections against sexual harassment, gender-based violence and employment discrimination.⁶⁴ Even where violence against women is treated seriously, it persists in some settings, so that equality of safety remains a work in progress.

⁵⁹ *Daniels* (n 58) (Sachs, J.). The statutes in question were the Intestate Succession Act 81 of 1987 and the Maintenance of Surviving Spouses Act 27 of 1990. The Court confined its holding to de facto monogamous Muslim marriages and left the position of polygynous marriages open. Moseneke, J., dissenting, would have confirmed the High Court’s declaration of invalidity and its reading-in of words.

⁶⁰ Eirinn Larsen, Ulla Manns & Ann-Catrin Ostman, *Gender-Equality Pioneering, or How Three Nordic States Celebrated 100 Years of Women’s Suffrage*, 47 SCANDINAVIAN J. HIST. 624 (2022).

⁶¹ Iceland enacted the first general gender-equality statute in the region in 1976, followed by Norway and Denmark in 1978, Sweden in 1979 and Finland in 1986.

⁶² Convention on the Elimination of All Forms of Discrimination Against Women, adopted by G.A. Res. 34/180 of 18 Dec. 1979, entered into force 3 Sept. 1981. Sweden was the first State to ratify the Convention, on 2 July 1980. Incorporation into domestic law came later and unevenly: Norway gave the Convention precedence over conflicting statute law only in 2009, while Sweden, Denmark and Iceland have not incorporated it.

⁶³ WORLD ECONOMIC FORUM, GLOBAL GENDER GAP REPORT 2023 (June 2023). The top five economies were Iceland, Norway, Finland, New Zealand and Sweden, in that order.

⁶⁴ STATISTA, WOMEN IN POLITICS IN THE NORDIC COUNTRIES - STATISTICS & FACTS (Einar H. Dyvik ed., Aug. 31, 2023, last modified July 10, 2024).

VII. CONCLUSION

In contrast to other States, the Indian Constitution has been committed to feminist principles since its inception, whereas the Constitution of the United States has not recognised the right to equality as a fundamental component of its text. Because of the standing and prosperity of the United States, it is not widely appreciated that its Constitution does not expressly protect the human rights of women and girls. Advocacy organisations report that the absence of a firm legal foundation for challenging harmful cultural practices bears disproportionately on girls: child marriage is reported to remain lawful in thirty-seven States, with more than 300,000 minors, some as young as ten, married between 2010 and 2018, of whom 86 per cent were girls; and female genital mutilation is reported not to be prohibited in nine States and the District of Columbia, with at least 513,000 women and girls living with or at risk of the practice.⁶⁵

The maternal mortality ratio in the United States is high for a high-income country, at 19 deaths for every 100,000 live births, and the adolescent birth rate stands at approximately 16 births per 1,000 girls. Some 55.2 per cent of women aged fifteen and over are in the labour force, compared with 66.4 per cent of men, and women hold about 27 per cent of parliamentary seats. Educational attainment is high, with 96.5 per cent of women aged twenty-five and over having completed secondary education.⁶⁶ On the Global Gender Gap Index the United States ranked forty-third of the 146 economies surveyed in 2024.⁶⁷ Critics argue that because American women lack explicit constitutional protection, rights that have been hard won remain vulnerable to withdrawal, as the recent reversal of the constitutional right to abortion illustrates.

South Africa's Constitution, like that of India, contains a feminist philosophy and guarantees women full protection under its laws. Despite those safeguards, women continue to be affected by traditional practices and remain vulnerable.

The approach of the Nordic countries differs from that of other regions. Of the Nordic constitutions only Norway's dates from the nineteenth century; those of Denmark, Finland,

⁶⁵ Misra (n 42). The article states that child marriage remains lawful in thirty-seven States; that more than 300,000 minors, some as young as ten, were married in the United States between 2010 and 2018; that girls account for 86 per cent of those minors; that nine States and the District of Columbia have no law prohibiting female genital mutilation; and that at least 513,000 women and girls are living with or at risk of the practice.

⁶⁶ UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 2021/2022: UNCERTAIN TIMES, UNSETTLED LIVES, Statistical Annex tbl. 5 (Gender Inequality Index), United States (2022). The United States records a Gender Inequality Index value of 0.179 and ranks forty-fourth of 191 countries. The maternal mortality figure in that table is drawn from 2017 data; the remaining indicators are for 2021. The parliamentary figure is the share of seats held by women across both chambers. The author attributed these figures to EQUALITY NOW (n 42), which does not carry them.

⁶⁷ WORLD ECONOMIC FORUM (n 10). The United States is ranked forty-third of the 146 economies surveyed in 2024.

Iceland and Sweden in their present form are twentieth-century instruments.⁶⁸ Their distinctive contribution lies less in the age of their constitutional texts than in the manner of policy implementation. On the United Nations Development Programme's Gender Inequality Index, Denmark, Norway and Sweden occupy the first three places, though Switzerland and the Netherlands rank above Finland and Iceland.⁶⁹

The women's movement in India began in the early twentieth century. It combined the nationalist anticolonial movement against British rule with the social reform movement, as the campaigns against sati and against the devadasi system attest. Both the leadership and the wider population were engaged in these social and political struggles during the first half of the twentieth century, and this shaped the drafting of the Constitution, particularly in the assumption that women's equality was not open to dispute. Universal suffrage, for example, was not a contested question when the Constituent Assembly convened in 1947 to frame the first Constitution of independent India. Women, having led their own movement and having participated on equal terms with men in the social reform and anticolonial struggles, were of necessity equal citizens in a democracy. On this account gender parity is the norm on which the language of the Indian Constitution proceeds, and there was accordingly no need to fight for an equal rights provision or an equal rights amendment of the kind sought in the United States, equality on the basis of sex having been treated as part of the Constitution from the outset.⁷⁰

On a careful examination of the position of women in the United States, the Nordic region and South Africa, Indian women are in no way inferior in terms of constitutional and legal guarantees. On the other hand, notwithstanding the Constitution's intrinsic feminist ideals, those ideals are not fully realised in everyday life. A few regressive legal terms, such as "honour" and "modesty", continue to support masculine domination. The growing realisation of rights must move beyond the idea that women are to be safeguarded.

⁶⁸ Norway's Constitution of 17 May 1814 remains in force. The other Nordic constitutions in their present form are instruments of the twentieth century: Iceland, Constitution of the Republic No. 33 of 17 June 1944; Denmark, Constitutional Act of 5 June 1953, replacing the Constitution of 1915 as amended in 1920, Denmark's first Constitution having been that of 5 June 1849; Sweden, Instrument of Government, SFS 1974:152, adopted in 1974 and in force from 1 January 1975, replacing the Instrument of Government of 1809 and the Riksdag Act of 1866; and Finland, Constitution 731/1999, in force from 1 March 2000, consolidating the Constitution Act of 17 July 1919 and three other constitutional acts.

⁶⁹ Olivia Nater, *What Are the Top Countries for Gender Equality?*, POPULATION CONNECTION (May 8, 2025), reporting the UNITED NATIONS DEVELOPMENT PROGRAMME Gender Inequality Index on 2023 data. On that index Denmark, Norway and Sweden occupy the first three places, but Switzerland and the Netherlands rank above Finland and Iceland. The Gender Inequality Index is a different instrument from the Global Gender Gap Index of the WORLD ECONOMIC FORUM and the two are not interchangeable.

⁷⁰ Atrey (n 11). The account in this and the following paragraph of the women's movement, of universal suffrage as a non-issue before the Constituent Assembly, and of the absence of any need in India for an equal rights amendment follows Atrey closely.

According to the Global Gender Gap Report 2024, which measures gender parity across 146 economies, Iceland remains the most gender-equal society in the world for the fifteenth successive year, with Finland, Norway, New Zealand and Sweden completing the first five.⁷¹ South Africa, the United States and India are ranked eighteenth, forty-third and 129th respectively.

These figures suggest that, notwithstanding the objectives of judicial and constitutional feminism, India's ranking reflects social norms that remain deeply embedded. It must equally be recognised that, whatever the global position, the status of women in India has improved greatly in recent years through the efforts of the framers of the Constitution and the work of judicial interpretation. It is important to acknowledge the progress achieved so far and to keep pressing for a society that is more just and more equal for women. As Swami Vivekananda wrote, "There is no chance for the welfare of the world unless the condition of women is improved. It is not possible for a bird to fly on only one wing."⁷² Constitutional feminism is thus not merely a philosophy; it is a way of ordering life and of moving towards a progressive society.

⁷¹ WORLD ECONOMIC FORUM (n 10). Iceland led the index for the fifteenth consecutive year and remains the only economy to have closed more than 90 per cent of its gender gap.

⁷² 6 THE COMPLETE WORKS OF SWAMI VIVEKANANDA, Epistles - Second Series, Letter LXXV (to Shashi, written from the United States, early 1895).