

Women and the Constitution: Reconciling Equality and Protective Discrimination in India

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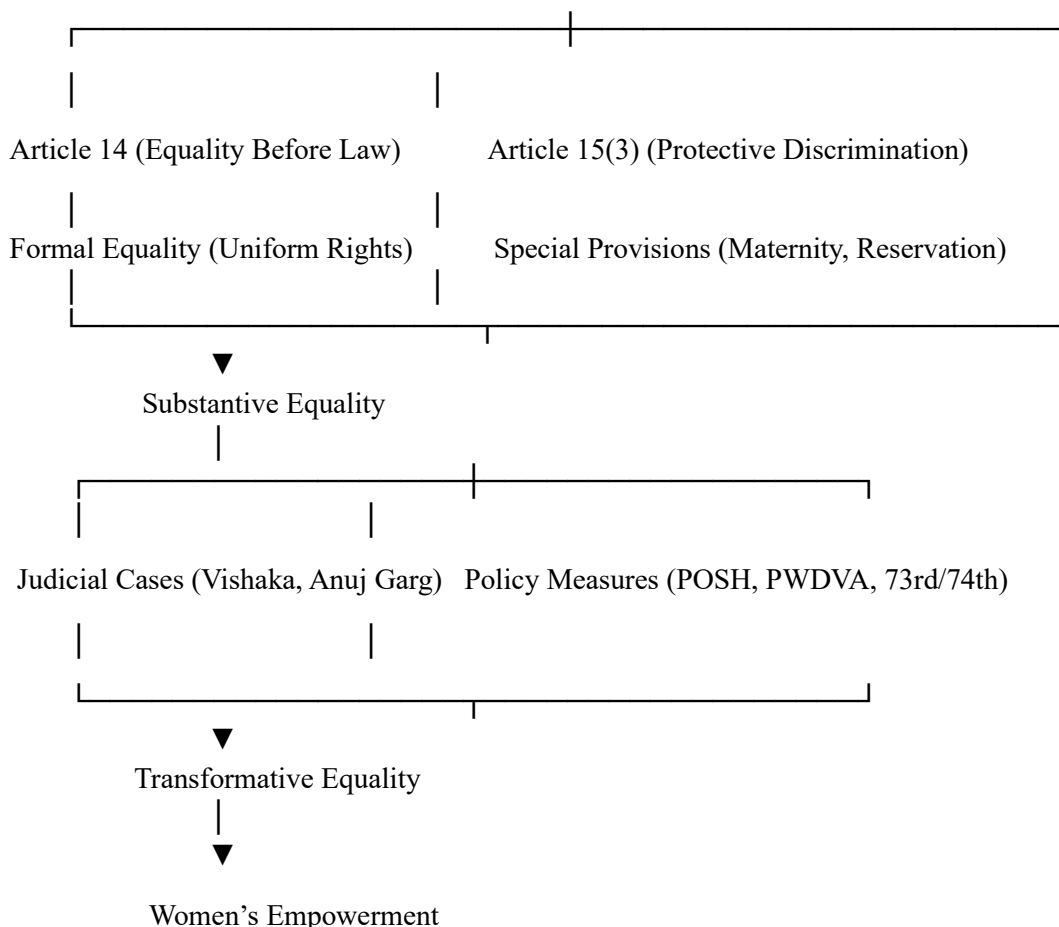
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Abstract

The Indian Constitution presents a distinctive framework that simultaneously guarantees equality before the law (Article 14) and permits special provisions for women (Article 15(3)). This duality often appears paradoxical, raising critical questions about whether protective discrimination strengthens empowerment or reinforces dependency. This article explores the constitutional, judicial, and sociological dimensions of this balance. By analyzing landmark Supreme Court judgments such as *Vishaka v. State of Rajasthan*, *Anuj Garg v. Hotel Association of India*, and *Sabarimala*, along with feminist theories of liberal, radical, and intersectional perspectives, the study demonstrates that protective discrimination is not antithetical to equality but rather an enabling mechanism for achieving substantive justice. It argues that true empowerment lies in transforming protective provisions from paternalistic safeguards into capability-enhancing instruments that dismantle systemic barriers. The article concludes that reconciling equality and protective discrimination requires a constitutional morality that prioritizes women's agency, dignity, and participation as equal citizens.

Keyword-Constitution, Article, Women, Equality, Protective, Duality

Women & Constitution



- (Use colour codes when presenting: Green = Equality, Red = Protection, Purple = Substantive Equality, Orange = Judicial Cases, Blue = Policy, Yellow = Empowerment.)

Introduction

The Constitution of India was designed not only as a legal framework but also as a transformative instrument to restructure society along egalitarian lines. For women, equality under the Constitution is particularly significant, given their centuries-long exclusion from property, education, politics, and public life. While Article 14 guarantees equality before the law, Article 15(3) permits the State to make special provisions for women, reflecting the framers' awareness that mere formal equality could not dismantle entrenched patriarchy.

This duality raises enduring debates: does protective discrimination empower women, or does it reinforce stereotypes of dependency? Liberal scholars caution against special treatment, while feminist and intersectional theorists argue that affirmative action is indispensable for correcting historical injustice.

Judicial pronouncements reflect this evolution. In *Air India v. Nargesh Meerza* (1981), sexist employment rules were struck down; in *Vishaka v. State of Rajasthan* (1997), sexual harassment at work was recognized as a violation of Articles 14, 15, and 21; in *Anuj Garg v. Hotel Association of India* (2008), paternalistic restrictions on women's employment were rejected; while *Joseph Shine* (2018) and *Sabarimala* (2018) showcased the Court's reliance on constitutional morality over patriarchal norms.

This article analyzes the constitutional framework, judicial interpretations, and sociological perspectives on equality and protective discrimination. It argues that Articles 14 and 15(3) are not contradictory but complementary—one guarantees formal recognition, while the other provides corrective justice. The aim is to demonstrate how protective provisions, if interpreted progressively, can evolve from paternalistic safeguards into transformative instruments of women's empowerment.

Review of Literature

Article 14 (Equality) —► Formal Equality

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Article 15(3) (Special Provisions) —┐

▼

Substantive Equality

▼

Transformative Equality

▼

Women's Empowerment

1) Constitutional Foundations: Equality plus Remedial Space

The Constituent Assembly Debates reveal a deliberate design that pairs Article 14 (equality before law) with Article 15(3) (special provisions for women and children). Ambedkar's interventions framed equality not only as a negative liberty (freedom from discrimination) but also a social project requiring affirmative state action. This dualism seeded an interpretive path from formal equality to substantive justice—a trajectory that later case law and scholarship deepen.

2) Equality Theories Shaping Indian Jurisprudence

Comparative constitutional theory distinguishes anti-classification (treat likes alike) from anti-subordination (dismantle hierarchies). Indian courts increasingly gravitate to the latter, aligning with:

- Liberal feminism (formal equality; risk of “structure-blindness”).
- Radical/Socialist feminism (patriarchy in labour/family; need targeted measures).
- Intersectionality (Crenshaw): gender injury is compounded by caste, class, religion, region, requiring tailored remedies.
- Capability approach (Sen; Nussbaum): equality = expanding real freedoms (mobility, safety, bodily integrity, paid work, political voice). This lens justifies maternity benefits, childcare, and representation as enablers, not paternalistic exceptions.

3) Indian Feminist Legal Scholarship: Protection vs. Paternalism

Indian scholars map how law can reproduce or remedy patriarchy:

- Flavia Agnes traces doctrinal gaps in personal and criminal law; urges purposive, context-sensitive readings that account for women’s lived realities.
- Lotika Sarkar and Kalpana Kannabiran highlight the institutional conditions—legal aid, shelters, gender-responsive policing—without which rights remain paper promises.
- Ratna Kapur and Nivedita Menon caution that “protection talk” can re-inscribe dependency, especially when framed as modesty/safety rather than agency and choice.
- Contemporary equality scholars (e.g., Tarunabh Khaitan, Gautam Bhatia) push anti-stereotyping and proportionality tests, now visible in Supreme Court doctrine.

4) Jurisprudential Evolution: From Formalism to Anti-Stereotyping

A line of cases charts the Court’s movement toward substantive and transformative equality:

- *Air India v. Nargesh Meerza* (1981): early strike against explicit sex discrimination in employment rules.
 - *Vishaka v. State of Rajasthan* (1997): imported CEDAW norms; linked workplace dignity to Arts. 14/15/21—landmark for positive obligations on employers/state.
 - *Anuj Garg v. Hotel Association of India* (2008): canonical anti-stereotyping judgment; struck down paternalistic night-work bans, demanded evidence-based justification, centered autonomy.
 - *Joseph Shine* (2018): adultery law invalidated for treating women as property; equality intertwined with dignity and sexual agency.
 - *Indian Young Lawyers Assn. (Sabarimala)*, 2018: constitutional morality preferred over exclusionary custom; equality as participatory access to public/religious life.
- Collectively, these decisions re-frame “protection” as capability-enabling rather than restrictive.

5) Statutes, Policies, and Their Implementation Record

Literature on statutory frameworks—PWDVA 2005, POSH 2013, Maternity Benefit Act, and 73rd/74th Amendments—emphasizes design and delivery:

- Measures that shift costs from women to institutions (crèches, safe transport, grievance redressal, flexible work) tend to be empowering.

- Blanket “safety” restrictions (e.g., absolute night-work bans) often erase choice and reproduce wage/role segregation.
- Implementation studies flag capacity gaps (under-resourced POSH committees, weak monitoring, low awareness), urging budgets, independent oversight, and survivor-centered processes.

6) Empirical Evidence on Representation & Outcomes

Political economy and development research links protective-cum-enabling measures to measurable change:

- Panchayat reservations for women alter local investment priorities toward basic services, safety, and water (Chattopadhyay & Duflo, 2004).
- Exposure to women leaders reduces voter bias and raises girls’ aspirations/education (Beaman et al., 2009; 2012).

This evidence supports Article 15(3)-type interventions as capability-enhancing, not merely symbolic.

7) International & Comparative Influences

- CEDAW and General Recommendations 19/35 (gender-based violence) ground Indian developments from *Vishaka* to POSH, treating freedom from harassment/violence as equality-enabling.
- South Africa (s.9) and Canada (s.15) showcase explicit substantive equality clauses and remedial measures; their anti-stereotyping and contextual proportionality analyses provide persuasive models for Indian courts and legislatures.

8) Persistent Critiques in the Literature

- **Paternalism risk:** “Safety” and “decency” narratives legitimize exclusion from high-paying sectors/shifts; courts now scrutinize such claims through evidence and narrow tailoring.
- **Selective reach:** Benefits often concentrate in the formal sector; informal workers and intersectionally marginalized women (Dalit, Adivasi, Muslim, migrants, single women) remain under-served.
- **Compliance without culture:** Box-ticking POSH committees coexist with hostile organizational cultures; scholars call for training intensity, process transparency, and time-bound resolution metrics.

9) Synthesis: Where the Field Converges

The literatures converge on four design principles for constitutionally sound protective discrimination:

1. **Anti-stereotyping:** no restrictions premised on chivalry/modesty tropes;
2. **Capability expansion:** measures must improve women’s real freedoms (mobility, safety, income, voice);
3. **Institutionalization:** budgets, audits, independent oversight, and data transparency;
4. **Review/Sunset:** periodic evaluation to prevent permanent dependency; recalibrate as structural gaps narrow.

10) Identified Gaps and This Study’s Contribution

Despite advances, gaps persist in bridging doctrine to delivery:

- Sector-specific translation: How *Anuj Garg*’s anti-stereotyping test should shape regulations in manufacturing, gig platforms, healthcare, policing.
- Intersectional audit: Whether protective schemes reach Dalit/Adivasi/minority/migrant women at comparable rates and outcomes.

- Compliance quality metrics: Move beyond “committee exists” to process quality (training hours/employee/year; average case duration; survivor satisfaction; retaliation rates).
- Transformative indicators: Develop capability-based KPIs (night-time mobility, post-maternity retention, women in P&L roles, grievance uptake and closure) to judge whether protection is actually empowering. Your article advances the field by proposing an Indian Anti-Stereotyping & Capability (I-ASC) framework: (a) screen out paternalistic rules; (b) require evidence of risk and narrow tailoring; (c) mandate capability-expanding alternatives; (d) attach monitoring KPIs and sunset reviews.

Judicial Landmarks

- *Air India v. Nargesh Meerza* (1981): Struck down sexist airline rules.
- *Vishaka v. State of Rajasthan* (1997): Workplace sexual harassment = violation of equality.
- *Anuj Garg v. Hotel Association of India* (2008): Rejected paternalistic restrictions; stressed empowerment.
- *Joseph Shine v. Union of India* (2018): Decriminalized adultery law treating women as property.
- *Sabarimala Case* (2018): Upheld women’s entry into temple; constitutional morality > religious patriarchy.

Analysis

The Indian Constitution creates a distinctive dual framework: Article 14 guarantees equality before the law, while Article 15(3) allows special provisions for women and children. This framework reflects a conscious choice by the framers to move beyond formal equality toward substantive justice. The analysis below highlights how these principles have evolved in theory, law, and practice.

1. Equality vs. Protective Discrimination

- **Equality (Article 14):** Ensures women are recognized as full citizens before the law, with the same rights and protections as men.
- **Protective Discrimination (Article 15(3)):** Recognizes women’s historical disadvantages and provides legal space for corrective measures.
- **Constitutional Logic:** Equality without protection risks reproducing inequality; protection without equality risks paternalism. Hence, both principles are complementary rather than contradictory.

2. Paternalism vs. Empowerment

- Early legislation often treated women as *weak dependents* requiring protection (e.g., night-work bans in factories).
- Progressive judicial interpretation has shifted this understanding:
 - *Anuj Garg v. Hotel Association of India* (2008) declared that paternalistic laws violate equality by denying women agency.
 - Protective measures should enable women’s freedom (maternity benefits, workplace safety laws) rather than restrict opportunities.

3. Judicial Trajectory

- **Air India v. Nargesh Meerza (1981):** Struck down discriminatory service rules.
- **Vishaka v. State of Rajasthan (1997):** Workplace sexual harassment recognized as a constitutional violation; court relied on CEDAW.

- **Anuj Garg (2008):** Landmark anti-stereotyping judgment rejecting protective restrictions that curtail women's employment.
- **Joseph Shine (2018):** Decriminalization of adultery law, recognizing women's autonomy and dignity.
- **Sabarimala (2018):** Asserted constitutional morality over social morality, upholding women's right to religious participation.

Together, these cases demonstrate a judicial progression from formal equality toward substantive and transformative equality.

4. Policy Measures and Outcomes

Protective provisions have been integrated into governance:

- **73rd and 74th Amendments:** Reservation for women in Panchayati Raj institutions has significantly increased their participation in local governance.
- **Maternity Benefit Act, POSH Act, PWDVA:** Designed as capability-enhancing measures.
- **Empirical Evidence:** Research shows female reservation in local bodies alters policy priorities (Chattopadhyay & Duflo, 2004), demonstrating that protective discrimination can yield real empowerment outcomes.

5. Towards Transformative Equality

The constitutional vision must be read not merely as equality in law but as equality in lived experience.

- **Formal Equality:** Women treated the same as men under law.
- **Substantive Equality:** Special measures correct systemic disadvantage.
- **Transformative Equality:** Seeks to change social structures, institutions, and cultural mindsets that perpetuate discrimination.

Protective discrimination must therefore be temporary, enabling, and progressive—designed to expand women's capabilities (education, mobility, work, voice) and dismantle structural barriers, rather than reinforce dependency.

6. Key Findings from the Analysis

1. Articles 14 and 15(3) operate in synergy, not contradiction.
2. Judicial interpretation has gradually moved from paternalism to agency-centered empowerment.
3. Protective measures are most effective when they expand women's real freedoms rather than restrict opportunities.
4. The future of gender justice lies in embedding constitutional morality and anti-stereotyping principles into both law and policy.

Methodology

- **Qualitative:** Case studies, interviews with women across socio-economic backgrounds.
- **Quantitative:** Data from Census, NFHS, NCRB, NSSO, UNDP Gender Index.
- **Analytical framework:** Gender lens, intersectional approach, empowerment indicators.

Findings / Key Issues

1. **Education:** Dropout rates, digital divide, literacy gap.

2. **Employment:** Gender wage gap, unpaid care work, glass ceiling.
3. **Health:** Maternal mortality, reproductive rights, mental health.
4. **Violence:** Domestic violence, sexual harassment, acid attacks, cyber abuse.
5. **Representation:** Under-representation in politics, judiciary, media, corporate boards.
6. **Legal & Policy Gaps:** Implementation challenges of laws like POSH, PWDVA, Maternity Benefit Act.

Discussion

- Structural-functionalism: Women's role in maintaining family/society vs. conflict theory highlighting gender oppression.
- Symbolic interactionism: Gender stereotypes in daily interactions.
- Globalization: New opportunities (IT, entrepreneurship) vs. new risks (trafficking, digital harassment).
- Empowerment models: Self-help groups, microfinance, education, political reservations.

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