

GENDERING CONSTITUTIONALISM: A COMPARATIVE STUDY OF INDIA AND SOUTH AFRICA

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Abstract

The paper tries to compare constitutionalism in India and South Africa using the lens of 'gender'. The paper is divided into two sections. The first section compares the role of women's organizations and their impact during the Constitution-making in India and South Africa. The objective is to introduce the unexplored dimension of "gender" in constitutional history. The context of the constitution shapes the text of the constitution. The context of framing of Indian constitution and South African constitution cannot be understood without analyzing the impact of the organized movement for women's rights in India (1917-1947) and South Africa (1955-1993) on the texts of their constitutions. The second section compares the provisions of the Indian constitution and the South African constitution to analyze the extent of gender transformation ushered by constitutions in India and South Africa. The paper highlights both the similarities and differences in the context and text of the Indian constitution and South African constitution with regard to the agenda of gender equality.

Keywords: Constitutionalism, gender equality, Preamble, Rights, women's organizations

The most significant accomplishments of feminist activism and practice has been to challenge the public-private distinction which consigned many of the concerns of women to the realm of private. The concerns of women have been brought to the sphere of political. More recently, feminist theory and activism has attempted

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to constitutionalize issues belonging to the domain of family. The patriarchal ideology rests on the supposition that women are the caretakers of their family including their husbands, children and senior citizens. Some of the recent constitutions have gone a long way in challenging this assumption. For instance, article 27 of the Rwandan Constitution, 2010 grants equal right and equal responsibility to both parents to bring up their children. It also mandates the state to draft an appropriate legislation and to establish necessary institutions for the protection family in general and women and children in particular. Article 46 of the Constitution of Colombia, 1991, mandates the collective responsibility of the state, family and society for the protection of senior citizens. It mandates the state to provide social security and food subsidies in the event of destitution. Moreover, the Constitution of Columbia, 1991, has provisions for the protection of children, adolescents and women.

Deriving from Vickers, “gender” is referred here as both a “category” and a “process” (Vickers 2013: 3). When we apply gender as a category of analysis, it illuminates new-fangled zones of analysis, structure questions of research and offers conceptions, classifications/definitions and supposition to direct a new category of a study. When we look at “gender” as a “process”, it can be seen as a component of various strategic decisions and activities including the facets relating to drafting and amending constitutions (*ibid.*). The process dimension underlines the point that the absence and side-lining of women from decision-making, may lead to neglect of women’s concerns. It is imperative to apply “gender” in study of constitutions since constitutions are the apparatuses through which “gender makes states” (*ibid.*). It is the constitution which states who are citizens (*ibid.*). Many older constitutions have excluded women from citizenship. Ritter points out that the struggle of women to be treated as equal individuals in constitutional regimes is still continuing in the United States (Ritter 2006). Gender scholarship has emphasized that constitutions can be “regendered” as occurred with Canada’s Charter of Rights (Vickers 2013: 8). In addressing the differential impact of the constitution, we need to identify the difference in the lived experiences of men and women and a certain element of commonality among women’s experience (Irving 2008). One of the attainments of gender scholarship has been to point out that states are dominated by men and masculine norms underlie political concepts (Vickers 2013: 1). More recently we have scholarship on queer theory and activism, which has introduced different categories under the concept of gender but the focus of

the paper is on the category of 'women', how women's activism has shaped the constitutions in India and South Africa and the scope of women's rights and equality as reflected in their constitutions.

When the older constitutions were drafted, women did not had representation in constitution-making bodies but few women did raise their concern through their writings. The conception of gender equality was not in the minds of drafters of the constitutions in 18th and 19th centuries and as a consequence, the constitutions drafted during that period are bereft of any reference to gender equality. It was only in the first half of the 20th century that few constitutions such as the Constitution of Soviet Union (1936), Germany (1919), Austria (1934) and China (1936) included explicit reference to gender equality. The Constitution Soviet Union, 1936, went farthest as it embodied gender equality in all spheres, namely, economic, social, cultural and political and also provided for maternity relief. After the end of the Cold War, new constitutions were adopted in various countries as a consequence of regime changes. In most of these countries, women were represented in the constitution making bodies and both domestic and international women's organizations took active interest in the development of new constitutions, thus most of the constitutions drafted after the end of cold war explicitly recognized gender equality (Irving 2008). But reference to gender equality is not adequate; the project of feminist constitutionalism attempts to evaluate the extent to which the constitution can facilitate in transforming the living conditions of women. We need to distinguish between measures that strengthen existing inequities even while addressing them and the measures that can help in equalizing and transforming society. For instance, maternity leave is significant for working women but it also buttresses the existing belief that caring of a child is the solitary charge of women; on the other hand parental leave for both men and women can go a long way in interrogating the belief.

More than half of existing national constitutions were drafted or revised over the last several decades, so it is not surprising that there has been an associated scholarly examination of the constitution-making processes (Katz 2012: 204). The scholarship on constitution-making emphasizes that constitutions share "core elements" despite differences in cultures, geography, history and other variables (*ibid.*). The mainstream scholarship on constitutionalism has ignored the involvement of women in constitution making and their impact on the texts of the constitutions. Though there has been some scholarship by feminist scholars around the world emphasizing on

the impact of women's involvement in constitution-making.

Elizabeth Katz (2012) based on her study of constitution-drafting process in four countries argues that women's impactful involvement in constitution-making necessitates two principal components: "women members of the constitution drafting body and an active, organized and inclusive national group" (ibid.: 220). According to Katz, the most significant component in women's significant input is an active women's organization that overcome religious, ethnic, economic and other diversities and bond women around shared objectives and the organization should also emphasise on advocating for women representatives within the drafting body (ibid.: 221). The significance of this effort is clearly exemplified by the constitution drafting process in South Africa, where the demonstrations led by the Women's League ensured equal representation of men and women in the constitution drafting body for the Interim Constitution.

Methodology and Case Selection

The paper adopts a comparative methodology. The study seeks to compare the making of the South African and the Indian Constitution and how it impacted the text of the constitutions. Both the scholars in South Africa and India have used the framework of "transformative constitutionalism" to emphasize the distinctiveness of their constitutions from liberal constitutions. It is interesting to note that it was Karl Klare, a constitutional scholar who first used the framework of transformative constitutionalism to analyze the Constitution of South Africa in his essay in 1998 and this framework was later on used by Upendra Baxi (2008) and Kalpana Kannabiran (2012) to analyze the Constitution of India. This framework is implicit in Rajeev Bhargava edited work "Politics and Ethics of the Indian Constitution" (2008). Though the Indian Constitution was framed more than four decades earlier than the South African Constitution, the theoretical work on Indian Constitution has only recently started. Most of the earlier works on Indian Constitution were limited to legal analysis. Austin's description of the Indian Constitution as "a document of social revolution" (Austin 1972) can be seen as precursor of the framework of transformative constitutionalism and S.K. Chaube's work "Constituent Assembly: Springboard of Revolution" (2000) interrogated Austin's assumption.

Scholars of comparative politics point out that an ideal comparison is between two cases which have both similarities and differences. South Africa and India share historical links. Nelson Mandela in

Rajiv Gandhi's Foundation Lecture held on 25 January 1995 stated, "The freedom of India started in South Africa; and India's freedom will not be complete till South Africa is free". Vijayshri Sripati (2007) points out that the heritage of Gandhi and Satyagraha is a common heritage of India and South Africa. Two important differences need to be noted. First relates to the different international landscapes; Indian Constitution was conceived and drafted before the adoption of UDHR, while the South African Constitution was drafted in an era of human rights movement and after an internationally scripted, normative constitutional framework had evolved (*ibid.*). International pressure contributed to dismantling apartheid in South Africa. The adoption of "Constitutional Principles" by the Western Contact Group (on Namibia) in 1982 to guide the process of constitution-making and the demise of Soviet Union provided a fillip to constitutionalism. Moreover, the World Bank's Rule of Law programme was crucial in the South African reconstruction process. The second difference relates to the process by which the constitution in India and South Africa were forged. Both Austin (1972) and B.Shiva Rao (1967) have pointed that despite the fact that the constitution can be understood as a culmination of freedom movement, but the Constituent Assembly was dominated by elites of the Indian National Congress and there was little public participation. On the other hand, Hassen Ebrahim (1999) points out that the South-African constitution was framed by a sharply participatory process. Nonetheless the similarities between the two nations make comparison meaningful. Both these nations have experienced colonialism. In India, colonial phase began in early 17th century when the English arrived as traders lured by spices. It was the lure of diamonds that beckoned the British to settle and invest in South Africa. The Union of South Africa in 1910 emerged after the fusion of two independent Boer republics with the British colonies. South Africa acquired dominion status within British Empire in 1936 whereas it became republic in 1961. Constitution-making in both these countries can be labelled as 'transformative' as both these countries were trying to break from the past and usher in a new epoch of freedom, equality and social justice. Scholars such as Ludwikowski argue that the existence of some common constitutional features justifies the comparisons of constitutions which are divided by time and space. Both these countries have adopted written constitutions and entrenched bill of rights and incorporated the principle of constitutional supremacy. Sripati (2007) points out that constitutions of these countries share a vision of human rights and have reposed

faith in the principle of judicial review not only limiting political power but also realizing social justice. Both India and South Africa have a plethora of diversity, South African constitution recognizes 11 national languages. Nelson Mandela stated, “Besides the cold facts of geography and history; the shared passion in pursuit of justice and happiness, both these nations share a common law tradition and are ethnically and culturally diverse nations” (Sripati 2007: 12).

Women’s Movement and Constitution-Making in India and South Africa

A comparative analysis of constitution-making in India and South Africa reveals the presence of women’s organization in both contexts (All India Women’s Conference (AIWC) in India and Women’s National Coalition established in 1991 as result of efforts of the African National Congress (ANC) Women’s League). It is interesting to note the contrast between the importance of gender as a variable in the constitution-making in India and South Africa. In India, there was a long period of mobilization and consensus on women’s issues but these issues were overshadowed by the other nationalist concerns at the founding moment and caste and religion overtook the attention. On the other hand, in South Africa, there was little consensus on the inclusion of gender equality in the anti-apartheid struggle before the mid- 1980s, but the struggle for women’s rights gained momentum by the efforts of the ANC Women’s League and ultimately the formation of Women’s National Coalition proved to be the determining factor in making the South African Constitution as the most gender- progressive constitution of the world. One of the similarities between India and South Africa is that the charter listing women’s rights was formulated in both India (AIWC Charter in 1945) and South Africa (WNC Charter in 1994).

All India Women’s Conference and Indian Woman’s Charter of Rights and Duties

The All India Women’s Conference (AIWC), established in 1927, was the most significant women’s organization in the pre-Independence period in India (Forbes 1996: 81). At the outset, the majority of the members of the Conference were from upper class Hindu families. Forbes points out that the recognition of ‘golden age’ theory by the members of the Conference restricted their potential to attract women from other communities and classes. It also repressed a

radical feminist critique of their society. The leaders were mindful of the fact that their work was taking them in two directions: one specifically towards the benefit of women and other intended at serving the entire nation. Their efforts on behalf of women were increasingly focused on legal disabilities while the concern with the well-being of the nation gaggled them towards Gandhi's programme of reconstruction and social action. Their concern in women's status in law pressed them towards alliance with British officials and members of the legislature while the Gandhian emphasis on village uplift and untouchables concerned work at the grass-roots level as well as a entirely different understanding of dynamics of social change (ibid.). The AIWC was primarily set up to discuss the issue of female education, it soon became obvious to its members that this issue could not be dealt without dealing with other issues such as purdah and child marriage (Menon 2003: 8). It was further realized that these issues could not be de-tangled from political subjection of the nation. AIWC reached a point where it articulated that "the political goal of national self government to achieve women's emancipation (ibid.). Keating argues that by espousing the goal of national self-government, the women's movement discarded the terms of "colonial paternalism" that considered the colonial state to be the protector of Indian women (Keating 2011: 41).

AIWC, documented one very significant and emblematic document, namely "Indian Woman's Charter of Rights and Duties", together with a "Memorandum on Planning for national welfare". These documents formed a part of the organisation's approach for getting the insertion of equal rights for women in the preparation of the Indian Constitution. Theorised and written by the association's executive leadership; Rajkumari Amrit Kaur, Hansa Mehta, Lakshmi Menon, Kamaladevi Chattopadhyay, Renuka Ray, Kitty Shiva Rao and Hannah Sen, the aforesaid documents formed an expression of the administrative philosophy and gender-related politics of the AIWC at this specific moment (Devenish 2019:56). Printed in the arrangement of a Constitution or social agreement, the Charter applied the terms "we think" and "we believe". The idea was to set up this charter as a genuine "voice of the people". It built on the philosophies of "the Karachi Resolution of 1931" and "the Report of the Sub-Committee on Women's Role in Planned Economy" by coalescing these with the AIWC's directive for 'equal rights and opportunities'. The Preamble of the Charter was tailed by a section on Fundamental Rights which reiterated sub-clauses e and f from the Karachi Resolution. The next was section was on Civic Rights which was followed by wide-ranging

sections on “Education”, “Health”, “Women and Work”, “Woman as Homemaker”, Woman and Property Rights, Woman and Marriage, Woman’s Place in the family, and finally one on the Duties of Woman. The Charter also comprised a section on an equal moral code which was drawn from the “Report of the Sub-Committee on Women’s Role in Planned Economy” (Ibid.).

The Charter’s frequent mention of “rights” exposed the increasing influence of a rights-based dialogue within the AIWC at this instant, a dialogue where the entitlement to rights offered the basis for the Indian woman as citizen to involve with the developing new nation-state. Brought into existence at the close of World War II, the Charter also sought to position itself within an developing international field explained by the United Nations and the terminology of human rights, which it embraced and used. The Charter asserts the phrase of “human being” as an all-encompassing category, and with it, the perception of equality and annexation based on the common claim to “human rights”:

“Whereas we believe that freedom and equality are essential to human developments and whereas woman is as much a human being as man and, therefore, entitled to share with him” (AIWC Charter 1945).

“Whereas in a democratic society, no citizen can be denied the fundamental rights which are founded on the basis of human equality” (ibid.).

Apart from being the terminologies of organisational philosophy and gender politics, the Charter and Memorandum were also working documents. These documents were written as part of the AIWC’s approach to achieve the incorporation of its mandate of “equal rights and opportunities” in the new Indian Constitution and the expansion of national economic and social policies (Devenish 2019).

Federation of South African Women and Women’s National Coalition

In the South African context, one needs to discuss the significance of the two prominent organization, one which was founded in 1954- Federation of South Africa Women and other founded in 1992- Women’s National Coalition. Both these organizations drafted charters listing women’s rights- “Women’s Charter of 1954,” approved by the Federation of South African Women (FEDSAW), and “the Women’s Charter” drafted by the Women’s National Coalition (WNC) and signed by the ANC in 1994.

FEDSAW overtly declared that while the primary struggle in South Africa was for democracy and an end to apartheid, that struggle cannot be won without the participation – and liberation – of women. The charter spoke not only about the apartheid system but also patriarchal system, challenging the “large section of our menfolk” who would not “concede to us the rights and privileges they demand for themselves”. The charter asserted that till the time women are granted complete and unqualified equality in law and practice, men will not be able to free themselves from the shackles of discrimination and prejudice. It further emphasized that freedom cannot be won till the time women are kept in servitude. The more definite demands of the charter were the right of men and women of all races to vote, equal job opportunities, equal pay for equal work, equal property rights, and equality in marriage and childrearing. It also called for paid maternity leave, childcare for working mothers, and compulsory free education for South African children of all races.

The Women’s Charter of 1954 was a pioneering text, bringing women’s rights into the larger human rights framework demanded by the anti-apartheid struggle. Its provisions were ultimately fused into the Freedom Charter (the blueprint of the freedom struggle) which was adopted at Kliptown in June 1955. But the charter was pervaded by patriarchal ideology. While claiming equality with men, it again and again emphasized the role of women as wives and mothers in a household similar to the one emphasized by women leaders in India, what Roy (2005) terms as the ‘ideology of domesticity’.

The charter stated:

“As wives and mothers, it falls upon us to make small wages stretch a long way. It is we who feel the cries of our children when they are hungry and sick. It is our lot to keep and care for the homes that are too small, broken and dirty to be kept clean. We know the burden of looking after children and land when our husbands are away in the mines, on the farms, and in the towns earning our daily bread” (Walker 1991: 183)

This para paints women as housewives involved in household activities and men as breadwinners, reflective of the public-private distinction. Thus, even when women are demanding entry in public sphere, ideology of domesticity based on public-private distinction remains firmly entrenched. Since raising women concerns was thought to be a disruption to anti-apartheid struggle, women leaders again and again emphasized on solidarity with men. The charter stated: “We women have stood and will stand shoulder to shoulder with our men folk in a common struggle against poverty, race and

class discrimination, and the evils of the colour bar” (ibid: 184). The charter not only demanded equality for women in the public sphere but also proclaimed the need for legal equality for women in the private sphere. The charter emphasized on the need for struggle for the elimination of laws and customs that deny African women the right to own, inherit or alienate property. Moreover, it stressed on the need for change in the laws of marriage which placed wives in the position of legal subjection to husbands, and gave husbands the power to dispose of wives’ property and earnings, and dictate to them in all matters affecting them and their children.

The charter can be regarded as also pervaded by feminist ideals. It emphasized that all the social differences between men and women, responsible for keeping women in a position of inferiority and subordination should be eradicated. Thus, the gender discourses during anti-colonial struggle in India and anti-apartheid struggle in South Africa reflect a dialectics between patriarchal ideology and feminist ideology.

In 1990, the African National Congress (ANC) started a campaign for the enlistment of women in sketching up “a Charter of Women’s Rights” to discuss and strengthen the new constitution (ANC 1990). In 1991, it was understood that there existed a shared concern amid women in diverse political and civil society establishments over the nature of gender subjugation. There was likewise consensus on the need to ingrain the purging of racism as well as sexism in the novel constitution and to safeguard women’s rights beyond a sheer constitutional pronouncement of parity amid women and men. To attain that, women groups agreed to bond in a movement for a “Charter of Women’s Rights” and to campaign for constitutional requirements that were essential to engrain parity for women (Albertyn 1994).

“The Women’s National Coalition (WNC)”, comprising 70 establishments across the racial, party-political, linguistic and ethnic gulf, was propelled in April 1992 for arraying a national movement for the expansion and education of women which would (1) obtain and distribute data about women’s requirements and ambitions and (2) amalgamate women in ramming and espousing a Charter to imbed parity for women in the novel constitution (Albertyn 2017). The role of the WNC was two-fold: to board on a political movement to assemble and educate women at common level; and to impact the nationwide procedure of writing a constitution. At the hub of these dual roles was a participatory exploration mission and operation to produce women’s demands for addition in a “Women’s Charter.” In

involving the women of South Africa by means of scripting a Charter, the WNC required to build a public crusade, and hence to mediate in countrywide politics.

The WNC carried the work of a pressure-group in the Constitution-making procedure and apart from this, this Coalition simultaneously propelled grassroots programmes for the purpose of assembling and instructing women (Geisler 2000). The success of the WNC was rooted in its ability to show feminists the possibility of adopting a non-racial feminist agenda and in its success in recognising diversity without overriding the collective feminist purpose (Meintjes 1998:49). The Agreement was envisioned as a political text that would monitor a range of party-political and legal policies on the way to parity for women in the constitution, and extra significantly, in the novel democracy (Albertyn 1994). Nonetheless, it did not essentially play this part. Specifically, it did not directly affect the text of the Provisional Constitution because political negotiations progressed more rapidly than the growth of the Charter.

The “Women’s National Coalition” started to lose adhesion amid women’s establishments after the attainment of its goals in “the Interim Constitution and Women’s Charter” and the leaving of key persons to parliament and administration. At this very time, civil society started to re-organize to involve in policy and law improvement work with the novel parliament and administration. The creation of issue-based corporations, alliances and groupings was given additional impulse by procedures in South Africa to make for the 1995 Fourth World Conference on Women in Beijing” in which women gathered around detailed subjects, plus gender parity, gender-based brutality and reproductive rights, amid others (Albertyn 1994).

Comparing the Text of the Indian Constitution and the South African Constitution

This section analyses the provisions of the Indian constitution and the South African constitution using the lens of gender.

Preamble

Founding values of the Indian Constitution enshrined in its Preamble are “justice, liberty, equality and fraternity” whereas the founding values of the South African constitution enshrined in its Preamble are “human dignity, equality, human rights and freedom”. The

order in which these values are mentioned reflects the significance attached to them.

The Preamble of the South African Constitution begins with recognition of the injustices of country's past. The prime objective of the Constitution as the supreme law of the Republic is to "heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights" (The Constitution of South Africa, 1996). Thus, the transformative role of the constitution is clearly envisaged in the Preamble of the South African constitution. The true potential of both men and women remains unrealized in a patriarchal society that socialized individuals into gender roles. Therefore, in order to free the potential of each person, shackles of patriarchy need to be overthrown. The concept of gender equality which is implicit in the Preamble is made explicit in Article 1 of the Constitution which recognizes non-sexism along with non-racialism as one of the founding principles.

Equality and Non-Discrimination

A comparative analysis of Article 15(1) of the Indian Constitution and Article 9(3) of the South African Constitution can demonstrate the lack of transformative agenda in the Indian Constitution, pertaining to the question of gender. While the Constitution of India prohibits discrimination on grounds of "sex", the Constitution of South Africa prohibits discrimination on each of these grounds—gender, sex, pregnancy, marital status, sexual orientation. Moreover Article 9(3) of the Constitution of South Africa mentions the words the state may not unfairly discriminate unlike Article 15(1) of the Indian Constitution which says that the state shall not discriminate. This had led Indian judiciary in many cases rule against legislations providing for positive discrimination or affirmative action. But the interesting thing is to note that Article 9(3) of the Constitution of South Africa prohibits discrimination on grounds of both "sex" and "gender", unlike Article 15(1) which prohibits discrimination only on grounds of "sex". Gender is a social construction which assigns different roles to men and women and situates them differently within the patriarchal system. The grounds of 'gender' has the potential to challenge familial ideology, to borrow the term used by Ratna Kapur and Brenda Crossman (1996), which allows a specific role to women in the family, and accepts sexual division of labour as an inevitable, natural and universal fact.

Also interesting is that article 15(1) of the Constitution of India

(1950) prohibits discrimination by the “state” and not the “society”. Though Article 15(2) tries to enshrine social equality to certain extent. Upendra Baxi in his article titled ‘Postcolonial Legality’ asserts that the Indian Constitution, ‘inaugurally’ expands the conception of rights further than the state to civil society (Baxi 2005: 545). He exemplifies this by pointing to ‘outlawing the practice of untouchability’ (ibid.). But if we analyse this claim from the perspective of gender, it becomes clear that while untouchability was abolished, there was no express provision regarding abolition of patriarchy.

Equality provision in the South African constitution bars discrimination by both society and ‘person’. The discrimination in employment on the basis of sex, gender and pregnancy is therefore prohibited not only in terms of employment in the public sector but also in the private sector. Article 22 grants freedom to every citizen to freely choose their trade, profession or occupation. Article 23 grants right to everyone (both citizens and non-citizens) of fair labour practices. Workers are ensured the right to form and join trade unions as well the right to strike (The Constitution of South Africa, 1996).

Article 15(3) of the Constitution of India states that “Nothing in this article shall prevent the state from making any special provision for women and children” (The Constitution of India, 1950). In today’s context, Article 15(3) is often perceived as enabling affirmative action for women but the time period between the drafting of India’s constitution and the incorporation of an explicit measure for affirmative action in the Constitution by 73rd and 74th Amendments 1992 supports the argument that at the time of enactment of the Constitution, Article 15(3) was thought as protective provision rather than affirmative action. It was not till 1995, that the Supreme Court of India in its blow of the decision of the High Court of Andhra Pradesh held that the “affirmative action measure for women was constitutional under Article 15(3) of the constitution” (*Government of Andhra Pradesh v. P.B. Vijay Kumar and another*, 1995).

The South African constitution does not specifically provide for any special provisions for women. It includes a general enabling provision for all categories of disadvantaged persons. Article 9(2) of the Constitution of South Africa (1996) provides for “advancement of persons or category of persons disadvantaged by unfair discrimination”. With regard to women, Article 187 of the Constitution provides for establishment of “Commission for Gender equality” with the mandate of “protection, development and

attainment of gender equality” (The Constitution of South Africa, 1996).

Rights

Anupama Roy points out that in nearly all conditions concerning removal of discrimination where “substantive citizenship rights can be enjoyed are listed only as Directive Principles” in the Indian constitution (Roy 2013). For instance, Article 39 of the Constitution, having vital implication for citizenship of women proclaims that the policies of the state are to be directed “towards securing, adequate means of livelihood” to both men and women and mandates “equal pay for equal work for both men and women” (Ibid.).

It is interesting to note that the South African constitution recognizes socio-economic rights which are judicially enforceable. While comparing constitutionalism of India and South Africa, Sripati (2007) points out that what the post-emergency Supreme Court in India did for constitutionalism in India was accomplished by constitution-makers in South Africa. Article 26 of the South African Constitution delivers the “right to have access to adequate housing”. Lack of adequate housing has important ramifications for women’s safety. Article 27 provides “right to access health care, food, water and social security”. It specifically mentions reproductive health care as component of health care services. Article 29 provides the “right to basic education”. It also provides the “right to receive education in either official language or in language of one’s choice” (The Constitution of South Africa, 1996).

Section 12 (1) of the South African Constitution provides freedom from “all forms of violence from either public or private sources”. Despite the fact that this provision is extended to ‘everyone’, it has special significance for women as it offers protection from violence in both public and private spheres. On the contrary, there is no explicit provision in the Indian constitution dealing with violence. This is strange that the constitution-framers did not felt the need to address violence despite being framed in the context of Partition where rape of women was rampant.

Irving (2008) points out that none of existing constitutions fully address the range of issues related to reproductive rights. The Constitution of South Africa is unique as it lays out meticulous provisions that identify women’s reproductive capacity (ibid.).

Article 12(2) –“ Everyone has the right to bodily and psychological integrity, which includes the right (a) to make decisions concerning

reproduction; (b) to security in and control over their body (c) not to be subjected to medical or scientific experiments without their informed consent” (The Constitution of South Africa, 1996).

Rights are meaningless if they cannot be enforced. Ambedkar considered Article 32 of the as the most important provision of the constitution. Article 32. (1) grants “the right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part” (The Constitution of India, 1950). Article 32 (2) grants the power to the Supreme Court “to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part” (*ibid.*). Clause 3 stipulates that “Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2)” (*ibid.*). Clause (4) grants protection against suspension of the right guaranteed by this article except as otherwise provided for by this Constitution (*ibid.*).

Article 38 of the South African constitution guarantees enforcement of rights by approaching the competent court. It lists down the category of persons that can approach the court. It includes “anyone acting in their own interest; acting on behalf of another person who cannot act in their own name; acting as a member of, or in the interest of, a group or class of persons; acting in the public interest; and an association acting in the interest of its members” (The Constitution of South Africa, 1996).

Constitutional Language

The Constitution of India uses the word “he” and “his” in the articles on citizenship. Throughout the constitution one finds words like “he” and “his” while referring to any office-bearer. Christina Murray (2001) points out that while the drafting of the South African Constitution of 1996, the language of the whole text of the Constitution (post-apartheid Constitution in South Africa) was examined from the standpoint of the gender. Two initial decisions were taken: the first to make the text “generally free of specific gender references” (*ibid.*: 822.). Thus, the alternative pronouns “he or she” were replaced with a “gender-neutral noun” and repeating it, if required (*ibid.*). “So instead of stating that a member of the National Assembly shall vacate his or her seat if he or she (a) ceases to be eligible for the membership of the National Assembly...”, the

corresponding proviso in the final constitution was drafted as “A person loses membership of the National Assembly if that person (a) ceases to be eligible.... and so on” (ibid.: 823.). In the places where using pronoun was unavoidable, “their” was used instead of “he” (ibid.). For instance, Section of the South African Constitution states, “Everyone has inherent dignity and the right to have their dignity respected and protected” (ibid.: 825). The remarkable thing to note is that the standard gender order ‘men and women’ was reversed (ibid.: 826). It is interesting to observe that even the provision governing the appointment of the national commissioner of police service refers to the appointment of a “woman or man”. Christina Murray states, “the point is really driven home” in Article 207(1) of the South African Constitution which states, “The President as head of the national executive must appoint a woman or a man as the National Commissioner of the police service, to control and manage the police service” (Murray 2001: 829).

Conclusion

The inclusion of sex equality in the Constitution of India, 1950 and the inclusion of gender progressive provisions in the Constitution of South Africa, 1996 was a result of organized women’s activism and movement in India and South Africa. We cannot understand the context of framing of Indian constitution and South African constitution without understanding the organized movement for women’s rights in India (1917-1947) and South Africa (1955-1993). Women’s movement is not considered part of constitutional history which usually refers to constitutional antecedents in the form of reform acts and Government of India Acts, 1919 and 1935 in the context of India and the four constitutions in South Africa. The paper explores the gender dimension in the account of constitution-making processes i.e., constitutional history. The gender dimension emphasize on the role of women’s movement and activism (immediate as well as historical) in putting the agenda of women’s rights or securing a place for it in the constitution-drafting.

It is fascinating to observe the contrast between the significance of gender as a variable in the constitution-making in India and South Africa. In India, we had a long period of mobilization and consensus on women’s issues but women’s issues were overshadowed by the other nationalist concerns at the founding moment most prominently, caste and religion. On the other hand, in South Africa, there was no consensus on women’s issues and there was limited

mobilization on women's issues till mid-1980s but women's activism gained ground within the ANC in mid-1980s followed by formation of Women's National Coalition in 1992 where women from different organizations and political parties united to pursue the agenda of women's rights. One of the similarities in constitution-making in India and South Africa is that the charter listing women's rights was formulated in both India (AIWC Charter in 1945) and South Africa (WNC Charter in 1994) which reveals that there was strong and organized women's movement and activism during the drafting of the Indian constitution and the South African Constitution.

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