

Gender Equality: Constitutional Law vis-à-vis Labour Law

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Abstract

The Indian Constitution ensures that every citizen, irrespective of their gender, is entitled to equality under the law and receives the same legal protection. The Constitution also emphasizes the State's dedication to fostering equal compensation for men and women for equal work, as mentioned in Article 39(d) of the Constitution. The Equal Remuneration Act of 1976, which sought to ensure that men and women workers are paid equally and to stop discrimination against women based on their sex in the workplace, strengthened this principle. There are several provisions in the Indian Constitution and labour laws that guarantee gender equality in a variety of spheres of life. The study puts light on various provisions of new labour codes which promote gender equality as well which are an assault on the same.

Keywords: Labour, gender equality, negative, wages, women

INTRODUCTION

The cruel reality is that women have long been mistreated in all societies, including India. The majority of the time, the division of labour has been caused by physiological differences between the sexes, which has resulted in male dominance of leadership roles and entrenched gender hierarchies in everything from tribal societies to agricultural civilizations to industrialised states. We have all seen discrimination and oppression in the past.

During the Vedic era in India, it is believed that women enjoyed a similar status as men, as mentioned in the Vedas and Upanishads that highlight female sages and seers. However, this equality quickly deteriorated over time, with practices such as sati (the burning of widows) and child marriage becoming prevalent, showcasing the stark gender disparity in Indian society. Even today, dysfunctional gender equality persists in various forms, including domestic violence, trafficking, dowry murders, female infanticide, female foeticide, sexual objectification, assault, and sexual harassment in the workplace. Women often face economic dependency on men for survival, with their roles and contributions in household chores undervalued and unrecognized. Although many women are now returning to work, they often face a double burden of balancing work and household responsibilities. Furthermore, women are often overlooked and perceived as less efficient than their male counterparts, resulting in their exclusion and vulnerability to job loss. Their overall family and social status is often disregarded, leading to poor socio-economic conditions. There is a pressing need for gender equality in all spheres of life, including recognition of women's contributions, equal opportunities, and fair treatment in society and the workplace, to address these persistent issues and uplift the status of women in India.

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The advancement of agricultural technology and the transition from subsistence to a market economy

have had adverse effects on women, who often lack education and skills. Many girls are forced to work at a young age, and women are often paid less for performing the same jobs. Discrimination and prejudice against workers, including women, are pervasive in various facets of society, leading to injustices, violence, and exploitation in families, workplaces, and communities. Despite efforts to address these issues, numerous laws enacted during colonial periods, such as the repeal of the Sati Act of 1829, the Widow Remarry Act of 1856, the Child Marriage Restraint Act of 1929, the Dowry Ban Act of 1961, and others, have been implemented to improve the status of women in India. However, challenges persist, and further measures are needed to address the systemic issues and discrimination faced by women in various spheres of life.

GENDER JUSTICE AND CONSTITUTION

Gender equality is a core principle protected by the Constitution of India. The Indian Constitution ensures that all citizens, regardless of their gender, have the right to be treated equally before the law and receive equal protection under it. This commitment to gender equality is firmly established in the Fundamental Rights section of the Constitution. Articles 14 and 15 explicitly forbid any form of sex-based discrimination and guarantee equal opportunities, access to resources, and public spaces for everyone.

Additionally, the Constitution has several provisions that specifically aim to promote gender equality. These include:

1. The Constitution mandates the reservation of one-third of seats in local bodies for women. This ensures that women have representation at the grass-root level of governance.
2. *Prohibition of discriminatory laws*: The Constitution prohibits the enactment of laws that discriminate against women. This ensures that laws are gender-neutral and do not disadvantage women.
3. *Maternity benefits*: The Constitution provides for maternity benefits for women. This includes paid leave during pregnancy and after childbirth, and protection from dismissal or discrimination on the basis of pregnancy.
4. The Constitution guarantees equal remuneration for men and women when they perform the same work. This provision is crucial in preventing women from receiving lower pay than men for equivalent tasks.
5. *Protection from sexual harassment*: The Constitution provides for protection from sexual harassment at the workplace. This includes setting up of internal complaints committees in workplaces, and provision of legal remedies to women who have been sexually harassed.

In addition to these constitutional provisions, the Indian judiciary has played an important role in upholding gender equality. Here are some landmark cases related to gender equality in India:

1. *Vishaka v. State of Rajasthan (1997)* [1]: The Supreme Court acknowledged that sexual harassment of women in the workplace constitutes a violation of their fundamental rights, including the right to gender equality and the right to work with dignity. As a result, the court established guidelines aimed at promoting gender equality and preventing sexual harassment in the workplace.
2. *State of Punjab v. Gurmit Singh (1996)* [2]: The precedent set by this case introduced the concept of strict liability for employers in incidents of sexual harassment in the workplace. The Supreme Court ruled that an employer may be held accountable for sexual harassment, regardless of their awareness of the harassment, under strict liability.
3. *Shayara Bano vs. Union of India (2017)* [3]: The Supreme Court, in this particular case, deemed the practice of instant triple talaq, a form of divorce in Islam that allows a husband to unilaterally divorce his wife by pronouncing "talaq" thrice, as unconstitutional and a violation of the rights of Muslim women as guaranteed by the Constitution.
4. *Anuj Garg vs. Hotel Association of India (2008)* [4]: The Supreme Court ruled in this case that women possess the right to work in bars and restaurants, and that any prohibition on their

employment in such establishments is discriminatory and contravenes the constitutional right to equality.

These are just a few examples of how the Indian Constitution and judiciary have worked towards achieving gender equality in India.

Gender Justice and Labour Law

Women have been granted a distinct status under industrial law, recognizing their unique physical, intellectual, and physiological characteristics. Numerous laws pertaining to women's employment were enacted during the British colonial era and after gaining independence. These laws not only included regulations pertaining to the health, safety, and welfare of women workers, but also ensured fair treatment for women workers under the law. Several of these legislative actions were shaped by the Conventions and Recommendations of the International Labor Organization. The primary objectives behind the enactment of these laws were to enable women to access services more effectively, safeguard the welfare of their children, and ensure that equal effort is rewarded with equal remuneration.

CODE ON WAGES, 2019

On July 23, 2019, Mr. Santosh Gangwar, the Minister of Labour, introduced The Code on Wages, 2019, before the Lok Sabha. This all-encompassing legislation seeks to govern wage and bonus matters for employees across different industries, trades, businesses, and manufacturing sectors. The Code consolidates four previously existing acts: the Payment of Wages Act of 1936, the Minimum Wages Act of 1948, the Payment of Bonus Act of 1965, and the Equal Remuneration Act of 1976, uniting them under a single framework [5].

In all the sections, common term (for all genders) worker and employee has been used (which as defined under Section 2 refers to any person) to refer about payment of minimum wages [6], payment of bonus [7], etc. Section 3 of the Code provides for prohibition of discrimination on grounds of gender.

In *M/s Mackinnon Mackenzie and Co. Ltd. vs. Audrey D'costa and others*, The Supreme Court invoked the Equal Remuneration Act to ensure that female stenographers were granted equal pay. The employer's argument, which claimed that female stenographers were only appointed to specific roles and that it was a customary practice, was rejected by the court. The court ruled that the management's decision to employ only women as confidential stenographers was not a valid justification for gender-based pay discrimination. The court further clarified that women are not exclusively required to serve as confidential stenographers and are fully capable of performing the duties assigned to male stenographers without any gender-based restrictions. The custom of hiring women as confidential stenographers cannot be used to justify paying them lower wages.

OCCUPATIONAL SAFETY, HEALTH AND WORKING CONDITIONS CODE, 2020

Chapter X of the Code addresses specific provisions concerning employment. It says that employment of women can be prohibited by the government rules where the government foresees the operations carried out at the establishment as dangerous to their safety and health [8]. The usual working time of women is 6 am to 7 pm unless otherwise made rules by the government [9]. The provisions of the chapter apply not only to the mines, plantations and factories but also establishments relating to beedi, cigar and construction works [10].

In case of *Vasantha R. v Union of India* [11], the Supreme Court held that, women can be allowed to work beyond the specific times but only after having written agreement from the woman with specific conditions to be fulfilled which include her consent and prohibition of sexual harassment.

Any employer if found guilty of contradicting to the provisions of employment of women will be liable to pay penalty up to Rs. 1 lakh [12].

CODE ON INDUSTRIAL RELATIONS, 2020

All establishments are subject to this code, with the exception of those performing domestic work, charitable and philanthropic work, sovereign state functions, and any activity that has been notified. It outlines guidelines for standing orders, notice requirements for lockouts and strikes, and trade union recognition of workplace disputes.

The code provides for no special section or clause for women except a clause in Section 4 that talks about Grievance Redressal Committee.

Hence, the code on Industrial Relation provides for representation of women in the Grievance Redressal Committee for resolution of disputes.

CODE ON SOCIAL SECURITY, 2020

The Code on Social Security, 2020 (referred to as the "SS Code") was introduced with the aim of extending social security coverage to all employees and workers, including those in the organized and unorganized sectors, as well as other sectors, and addressing matters connected thereto. The SS Code combines and revises various laws pertaining to social security, which include the Employees' State Insurance Act of 1948, Employees' Provident Funds and Miscellaneous Provisions Act of 1952, Employment Exchanges (Compulsory Notification of Vacancies) Act of 1959, Maternity Benefit Act of 1961, Payment of Gratuity Act of 1972, Cine-Workers Welfare Fund Act of 1981, Building and Other Construction Workers Welfare Cess Act of 1996, and Unorganized Workers' Social Security Act of 2008. These laws have been combined into a single code to streamline and enhance the social security framework for all workers across different sectors.

Chapter IV deals with Employees State Insurance Corporation. Section 32 provides for periodical payments to a woman Insured Person (commissioning mother or who adopts a child of up to 3 months [13]) (and her dependents which include her mother-in-law and father-in-law [14]) in the event of illness brought on by pregnancy, a child's early birth, or a miscarriage [15]. However, Section 41 states that any female employee who qualifies for maternity benefits under this Chapter is not eligible to request benefits from her employer under Chapter VI.

Chapter VI (Section 59-72) of the Code deals with the Maternity Benefit. No employer can knowingly employ a woman nor can a woman work in an establishment during the 6 weeks immediately following the day of her delivery, miscarriage or medical termination of pregnancy [16]. And if the woman herself requests for work during this time, must not be allowed to do work for long standing hours or of arduous nature affecting her health.

Each female employee has the right to receive maternity benefits, and it is the legal obligation of her employer to compensate her with an amount equivalent to her average daily wage during her absence. This coverage includes the period leading up to the day of her delivery and any time immediately following that day. However, the woman can avail the maternity benefits only if she has been employed for at least 8 days in the 12 months preceding the expected delivery date [17].

For a commissioning or adopting mother, it's 12 weeks from the day of commissioning or adoption. The woman if dies at the time of her delivery, her nominee shall be entitled to the amount till the date of her death and if she dies but the child survives then for the entire period [18].

In addition, the Supreme Court invalidated the rule that stated an air hostess would lose her job if she became pregnant for the first time in *Air India v. Nargesh Mirza* [19] because it was arbitrary and repugnant to the ideals of a civilised society. According to this regulation, an Air Hostess could choose to retire when reaching 35 years of age, getting married within 4 years of employment, or experiencing her first pregnancy, whichever occurred earlier.

Any woman entitled to the maternity benefit can ask for it by writing a notice on the day of starting of absence or soon after her delivery. However, not sending the required notice cannot abstain her from the benefit. If the employer is not providing pre and postnatal care, a medical bonus of Rs. 3500 is also payable to her.

In case of termination or miscarriage, a woman is entitled to paid leave of 6 weeks from the date of happening and in case of tubectomy operation for 2 weeks. A woman can take nursing breaks as per government guidelines till the child turns of 15 months [20].

It would be unlawful for the employer to discharge a woman from her services if she absents herself according to the provisions during her pregnancy [21]. If discharged during the period of maternity benefit, she would be entitled to the benefit unless she was discharged due to grave misconduct, which she still can be put to review.

In *Mrs. Neera Mathur vs. Life Insurance Corporation of India* [22], Neera Mathur, a probationary employee at the Life Insurance Corporation (LIC), had requested and was granted maternity leave during her probation period. However, upon her return, her service was abruptly terminated by LIC, citing her alleged false declaration during the employment application process. The court found that the details required in columns (iii) to (viii) of the declaration were "truly embarrassing, if not downright humiliating" and deemed them unreasonable. As a result, the discharge was overturned by the court.

NEW LABOUR CODES: NEGATIVE IMPACT

Assault on Right to Equal Remuneration

Article 39(d) of the Constitution of India underscores the State's commitment to promoting equal pay for equal work for both men and women. This principle was further reinforced by the enactment of the Equal Remuneration Act, 1976, which aimed to ensure that male and female workers are paid equally for the same work and to prevent discrimination against women in employment based on their sex. This law prohibits discrimination in payment of remuneration and conditions of service based on gender. However, with the recent introduction of the Wage Code, the concept of 'equal wages' is narrowly defined in section 2(y) and includes certain exclusions, which raises concerns about the potential for gender discrimination to occur in certain situations, e.g., any commission due to the employee, any compensation for retrenchment or other retirement benefits due to the employee.

Reduced Maternity Benefit

The determination of Maternity Benefit is notably impacted by the updated definition of wages in the Social Security Code. Consequently, while a woman on maternity leave may still be eligible for maternity benefits, the concept of "wages" would now exclude the following:

- house rent allowance;
- any conveyance allowance; and
- commission payable to the employee.

Permitting Night Shift for Women

Another concerning change is the removal of the prohibition on employing women in night shifts. The revised section now allows for the employment of women during night hours (between 7 pm and 6 am) with their consent. However, the issue at hand is that in contexts where there are significant power imbalances, such as gender inequality, consent cannot be assumed to be truly voluntary. This is particularly relevant in a country like India, where poverty and unemployment are widespread, and there is a lack of equality in bargaining power. Under the Factories Act, it is prohibited to require or allow any woman to work in a factory between the hours of 7 pm and 6 am. Furthermore, even with relaxation granted by the State government, employment of women between 10 pm and 5 am is not permitted.

Curtailment of Provision of Crèche

As per statutory requirements, guidelines for the maintenance of crèches include provisions for adequate accommodation, proper lighting and ventilation, cleanliness and sanitation, and supervision by a woman trained in childcare.

However, under the new Social Security Code, there are two notable changes:

1. Factories with less than 50 workers, but with at least 30 women workers, are now exempted from the requirement to provide crèche facilities as per the revised provisions.
2. The previously mandated statutory requirements for crèches, such as ventilation and sanitation standards, are no longer explicitly mandated.

CONCLUSION

The Indian Constitution and labour laws have several provisions to ensure gender equality in various spheres of life.

Women's rights in the workplace are safeguarded by labour laws in India, which offer several provisions for their protection. The Maternity Benefit Act of 1961 grants women employees maternity leave of up to 26 weeks and prohibits their employment for 6 weeks after childbirth. The Equal Remuneration Act of 1976 ensures that men and women receive equitable pay for performing similar work. The Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act of 2013 aims to prevent and address instances of sexual harassment faced by women in their workplaces.

The Constitution of India includes a significant provision for the reservation of seats for women. The 73rd and 74th Amendments to the Constitution mandate the reservation of one-third of the seats in local bodies for women, promoting their participation in local governance. Additionally, the Women's Reservation Bill, presently pending in Parliament, seeks to reserve one-third of the seats in the Lok Sabha and state legislative assemblies for women, further advancing gender representation in the political realm.

In conclusion, the Indian Constitution and labour laws have several provisions to ensure gender equality. However, the implementation of these provisions is still a challenge, and there is a need for greater awareness and sensitization among all stakeholders to achieve gender equality in its true sense.

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