

Gender Inclusiveness as Challenge to Indian Labour Laws in Context of Equal Pay and Maternity Benefits

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Abstract

There are laws present in India to address discrimination faced by employees at workplace on the basis of their gender. In the year 2020, the legislature consolidated 29 Central labour laws into four new labour codes. This study analyses the provisions of the new labour codes aimed at achieving social justice and equity for the workforce, and contends that the policy fails to address the concern of gender inclusivity.

Keywords: New labour codes 2020, maternity benefit act, equal pay for equal work, labour code for third gender, gender inclusivity, equity for workforce

INTRODUCTION

The proverbial glass ceiling has existed for generations despite gender equality being in-vogue for half a century. For the longest time, gender inequality has ruled the societal, organisational and institutional setups in the country, making gender inclusivity the need of the hour for a healthy and thriving society. However, gender inclusion is an abstraction that surpasses the notion of mere equality. It is the idea that institutions should not get dictated by the gender stereotypes, societal roles and expectations. The legislation of a country should be reflective of the same.

At the macro level, women's employment prospects have improved to some extent over the past decades, paving the way for some herald signs of fuller integration of women into the workplace. However, the promises and assurances contained in the law and the underlying reality differ. As long as there is bias and discriminatory behaviour towards female workers in the workplace, the provision cannot achieve its objectives.

Inclusivity in Indian workplace till date has existed at the cost of exclusion of transgenders. The laws aiming to eliminate gender inequality are essentially reinforcing the binary of gender that has existed since time immemorial. When we come up with the idea of an inclusive or gender-neutral workplace, we are talking about something more than just diversity. A company hiring a woman or someone who identifies as transgender only diversifies the workforce. Diversity is different from inclusivity; with diversity one cannot guarantee an equal platform for all genders in the workplace.

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The Second National Commission on Labour recommended consolidation of central labour laws; the objective of which was to simplify and modernise labour regulation. The challenge before the government was to bring uniformity in the labour laws as there were numerous definitions to common terms in different acts, the intent behind was to facilitate employment growth while

protecting worker's rights. In the year 2019, the legislature consolidated 29 central labour laws into four labour codes, namely:

- Industrial Relations Code Bill, 2020.
- Code on Social Security Bill, 2020.
- Occupational Safety, Health and Working Conditions Code Bill, 2020.
- The Code on Wages, 2019.

The new codes have given a uniform picture to the Indian labour laws to an extent but fail to include provisions for a gender inclusive workplace. This essay aims to critically analyse the provisions in the light of importance of gender inclusiveness and explore how the code fails to promise a progressive future for the Indian employees and employers. The essay will extensively discuss the problems and bias faced by the employees on the grounds of gender focusing on maternity benefit and equal pay, suggesting recourse keeping in view the dynamic nature of the Indian society.

MATERNITY BENEFIT ACT: WOMAN A SYNONYM FOR PARENTHOOD?

The Rajya Sabha, on 2nd September 2020 amidst the boycott of the opposition completed the government's codification of 29 labour laws into 4 codes. Unification of the Labour Laws, led to the Maternity Benefit Act, 2017 being subsumed in the new Code on Social Security, 2020. The Maternity Benefit Act traces back to 1961, when in the light of International Labour Organisation's conventions and recommendations the Indian legislation drafted laws to protect women, particularly before and after child birth. The then passed legislation was seen to be a ray of hope in a society struggling with gender inequality. In time, subsequent amendments were made, taking into account the changing nature of the society and the societal needs of woman gradually gaining ground in the working field, the by-product being the Maternity Benefit Act of 2017.

Drawn on the principles of equality and non-discrimination, this piece of legislation aims to safeguard the interests of women participating in the public sphere of organised labour. The Maternity Benefit Act consolidated under the new Code on Social Security does fulfil the essentials of an ambitious and pioneering legislation with the potential to alleviate the problems faced by women and children during maternity, but at the same time it fails to be gender-inclusive.

Reinstates Gendered Division of Labour: Need of Policy for Equal Parenting

Since the beginning of time, the onus of household work and childcare has fallen onto the shoulders of women. Their participation in economic activity is contingent upon numerous factors such as that of biological, economic, social and cultural nature, which result in gender inequality in the family as well as in the economic and political system [1]. The onus of family along with taking care of the child and the failure of employers and policy makers to deal consistently with this issue exacerbate the difficulties women face in the economy. The introduction of maternity leave and benefits as the only parental benefit option reinforces the idea of female domesticity and fails to bridge the gap between the domestic and the public sphere; rather, it segregates them even more.

It is a proven fact that the participation of women in a country's workforce drives the overall economy of the country. However, for them to participate, the social dichotomy that exists of managing the workplace and responsibilities at home simultaneously needs to be addressed. Female participation rates declined from 34.1% in 1999–00 to 22% in 2011–12, and wide gender differences in participation rate also persisted [2]. According to the study conducted by the Genpact Centre for Women's Leadership, a wing of the University, 50% of working women in the country leave their jobs to take care of their children at the age of 30. Even among those who manage to return, 48% drop out within 4 months of re-joining the workforce [3]. This reflects the gendered division of labour highly prevalent in the society, where the females are being relegated to fulfil their "primary role" of caring and providing for the family in the confines of their homes and often at the cost of leaving their jobs.

A reading of the act will help one realise that the visionary provisions that have been laid down, attempting to eradicate the gender inequality faced by women is essentially at the same time reinstating the woman's "primary role" to be a mother and the caregiver by not recognising the division of labour. Claimants of progressiveness of the Act fail to realise that the far-reaching legislation in action is still actively promoting the age-old notion of gendered division of labour, not recognising that child-care is not invariably a woman's job but of both the parents. The ambit of the act solely focus on the biological need of the woman to take the time to nurse the kid, completely evading the reality that one needs to rest and heal in the post-partum phase, and that is exactly when support and assistance becomes much needed from the other partner.

The concept of Paternity Leave does not fall within the ambit of the act and its very absence exposes the gendered gap in our labour laws. Nordic Countries such as that of Scandinavia, Norway, Sweden and Denmark are worldwide appreciated for their attractive and generous policies for working parents. Their recognition and emphasis on both the parents sharing the leave as well as actively participating in child care is noteworthy. Their legislation for parental, paternity and adoption leave is testament of the same. For instance, parents in Sweden are entitled to 480 days of paid parental leave when a child is born or adopted. Each parent, should they be two, is entitled to 240 of those days. If the child is born in 2016 or later, each parent has 90 days reserved exclusively for him/her [4]. In Denmark, a total of 52 weeks of paid parental leave is available which can be divided accordingly between the parents in consonance of their wishes and choices. In Norway, the term "daddy quota" has gained where a part of the parental leave is exclusively reserved for the father.

In developing the legal framework on parental leave, equality of opportunities has been a guiding principle, with a view to both promoting women's labour market participation and encouraging men to spend more time at home, taking care of their children in these countries [5], and this rationale seems to be missing in the drafting of our laws. In India, the only provision pertaining to paternity leave exists under Central Civil Services (Leave) Rule 551 (A) [6], where there is provision for male employees to avail a paid paternity leave of 15 days. Other than this, there is no other binding legislation that allows for the same. The responsibility to provide male employees paternity leaves is left on the discretion of the private sector.

Section 60 (4) provides for a 12 week leave for a woman who legally adopts a child below the age of 3 months or for a commissioning mother, as the case may be [7]. This provision goes on to show that the act recognises the need of a woman to care for a child even when she is not involved in the biological process of giving birth. This goes on to perpetuate the bias that already subsists in the society that caring for the child is a "woman-centric" job instead of it being a social act where both the parents have to equally contribute in the upbringing of the child.

In an age of labour law reform, it is important that the law keeps pace with the evolution of parenthood and the transformation of a traditional patriarchal family structure into a more egalitarian one. When there is unequal distribution of labour between the genders, ultimately puts the brunt of child-bearing responsibilities on the woman. Even though there are provisions for punishing employers who dismiss employees for absence during pregnancy, it does not ameliorate the ground reality that women of child-bearing age are anyway discriminated in the workplace during employment or promotion. Normalisation of paternity leaves and an attitude change towards parenting will help reach the egalitarian vision.

Reinstates the Heteronormative Paradigm in Parenting: Need of Policy for Transgenders

Gender for the longest time has been identified as a binary concept, limiting it to a man and woman and the laws have been strictly adhering to this norm. It was in the landmark case of, Navtej Singh Johar v. Union of India that the court declared transgender people independent of the binary sexes and confirmed their identity as the third gender in accordance with our Constitution [8]. This was followed up by the Transgenders Persons (Protection of Rights) Act, 2019 providing for protection of

rights of transgenders and their welfare. It is pertinent to note that the act emphasizes that no private or state body should discriminate against the third gender in hiring or promotion, in addition, any type of biased treatment or discriminatory dismissal is prohibited. However, the ground reality is incongruent to the provisions laid down.

The aim of the Maternity Benefit under the Code on Social Security is to provide for a paid leave for a certain period before and after the childbirth to ensure the rights of working women, when pregnant and post child birth are protected and rightly cared for by the law. However, relegating the role of a “mother” only to a woman is very limiting in nature. Anyone irrespective of their sexual orientation can be involved in the process of birthing and caring of a child.

Throughout the Code, the maternity benefits have been conformed to the binary of “woman”, completely eluding the realm of transgender persons who have the ability to give birth and/or have opted for adoption [9]. The definition of woman is non-inclusive of individuals of different sexual orientations. Leaving transgenders out of its ambit, the code fails to provide for them. Transgender people also have the right to have a child, and the Code on Social Security is silent on whether the legislation would apply to all genders.

In the case of, *KS Puttaswamy v Union of India*, the Supreme Court held that procreation and sexual orientation are inherent to the dignity of an individual which requires constitutional protection [10]. The ideals of social justice and gender equality are the basis for the formulation of laws such as the maternity benefit to protect the rights of individual involved in the biological process of child-birth. Non-inclusion of transgenders goes against these ideals.

Recognition of commissioning mothers as primary care givers goes on to show the progressive nature of the code but at the same time violates the right to motherhood of a transgender by not being comprehensive. The term gender equity has always been practised and propagated in the gender binary of man and woman, with changing social conditions, it is high time that the legislation protects and cares for transgenders as well.

EQUAL PAY FOR EQUAL WORK: AN OUTLYING DREAM FOR INDIANS

India ranks 140th in the World Economic Forum's Global Gender Gap Index of 2021 [11] out of 156 countries, compared to 112 in 2020 [12]. There are many reasons leading to this wide gap, including socio-economic and structural problems in the country. The COVID-19 pandemic and its economic impact was another reason why the country dropped 28 places this year on the World Economic Forum's Global Gender Index. However, the pandemic cannot be blamed solely for this situation in the country. The law contains rules and regulations to ensure equal pay for equal work prior to the 2019 Wage Code, but the Monster Wage Index (MSI), published in March 2019, shows that women in the country earn 19% less than men. The study found that the average gross hourly wage of men in India in 2018 was Rs. 242.49 and women Rs. 196.3, meaning men earned Rs. 46.19 more than women. The survey reveals the inability of the system to properly enforce the law [13].

The Constitution of India under Articles 39(d) and 41 puts forward the directive principle for equal pay for equal work, irrespective of gender. Prior to the 2019 Wage Code, the 1976 Equal Remuneration Act was the law that provided equal pay for men and women and ensured non-discriminatory behaviour towards everyone even during the process of recruitment or promotion.

The pay gap stems from the social prejudice held by society against working women in India. The exploitation at workplace continues for women; however, the females working in the unorganized sector are more vulnerable as the directive principle in the Constitution and the provisions under Unorganized worker social security act, 2008 has failed to protect and safeguard their rights. In the organized sector, irrespective of the laws, employers are reluctant to hire female workers because they

want to avoid paying maternity allowance and have preconceptions that women will not prefer late night shifts and would be less beneficial to the company. Along with this, lack of awareness on part of employees and occupational sexism contributed to the same.

The Code on Wages Act, 2019 was enacted with the legislative intent to bring uniformity to wages paid and guarantee certain minimum wages to workers. Clause 1 of section 3 of the act [14] puts forward that “There shall be no discrimination in an establishment or any unit thereof among employees on the ground of gender in matters relating to wages by the same employer, in respect of the same work or work of a similar nature done by any employee”. Sub clause 2 of the same section [15] further clarifies that no employer will reduce wages of any employee in order to comply with the provision laid down in Section 3(1) of the act, further, there will be no discrimination in recruitment of any employee on the basis of gender for same kind of work provided women in such work are restricted by any law for that time. In line with the progressive vision set out in section 3 of the Act, section 4 states that in the event of a dispute as to whether the work is identical or similar in nature within the meaning of Section 3, the dispute will be resolved by such an authority which may be notified to the appropriate government [16]. The act imposes a fine of Rs. 20000, if any employer fails to comply with the above provisions within 5 years [17], if the offense recurs, then a prison sentence of 1 month or a fine of Rs. 40000, or both. However, Inspector cum Facilitator [18] may, prior to commencing any sort of proceedings for offenses covered by this clause or subsection, provides employers with the opportunity to comply with this Code by written directions.

Only six countries in the world give women same rights as those of men and even United States is not a part, these countries are Belgium, Denmark, France, Latvia, Luxemburg and Sweden [19]. Equal opportunities and legal reforms for gender equality in the country have a positive effect on the economy. The rights granted encourage women to work, as is the case in the six countries mentioned [20]. Women make up the major part of the workforce, countries that provide ease of work through social and legal reforms develop faster in the socio-economic spheres [21].

The paradigm to pay women less might have arisen from the ancient times practice that female look after the house and males are the breadwinner who earn for their homes, for a long period of time even schools taught this. We are living in the 21st century with comparatively more educated and independent women and many single mothers who are sole breadwinner of their households, the whole system becomes unfair to them. The unemployment rate is high in India due to unfair preference given to male over female it becomes very difficult to secure a job due to which the important right of equal pay becomes secondary to many female workers and they try to neglect and not raise their voice against the same. Even with the proper legislation in India, the reality is disappointing.

The COVID-19 pandemic has forced the world towards a reform mode of slavery. Previously, women were not paid the same pay for the same work, but now, with the economic downturn faced by various countries, it is unrealistic to expect employers not to take undue advantage of this vulnerable part of the labour force. Alarming situation arose when one of the largest states of India, Uttar Pradesh passed an ordinance granting exemptions for all factories and establishments involved in the manufacturing process from all labour laws except four in the state for a period of 3 years. This can be termed as “labour law holiday” which was declared in many other states such as Madhya Pradesh, Gujarat, Rajasthan, Himachal Pradesh, Uttarakhand, etc. There were various reasons estimated to take such a decision; one being to boost up industries and escalate economic growth, and another reason being opening up Indian markets for the firms that might exit China in view of pandemic as India is a great alternative for the same [22].

The response of the states in the wake of pandemic in order to boost the economy has subjected the workers at risk, the regulations further shift in time a vision that society saw as an opportunity to

revive the country's economy. Maintaining gender neutrality and bringing legal reforms to ensure equal pay was seen as realistic decisions in order to boost the economy. However, the states decided to open up their markets for foreign investment at the cost of social security of their workers. The Indian workforce needs structural and social reforms to address occupational sexism in terms of strong rights with stricter criminal provisions and effective control mechanism that the new law fails to provide. In terms of equal pay, the statutory provisions have existed for a long time; still, India has a wider wage gap according to various surveys.

The possible reform for this could be starting at the grassroots level, the new code appoints an inspector who is acting as the control mechanism, what might be done is appointing regional committees with equal representation in terms of gender and social backgrounds which can look after the complaints. Statutory provisions do not solely guarantee effective implementation of laws nor does representation of gender in a committee but the combined effort of both might act as an effective control mechanism over the concerned authority. Complaints will be handled and addressed by this committee with no bias involved according to the statutory provisions laid down by the legislature. In this manner, there will be no one person involved in taking decision and effective representation will lead to reasoned decisions in resolving complaints of unequal pay for the same kind of work.

Woes of the Third Gender

"People will sometimes put each other in boxes and have biases toward one another because of what they look like or where they come from or who they are."

—Rich Moore

The Supreme Court of India recognised the transgenders as third gender of India in the year 2014 [23]; following which the country's parliament passed The Transgender Persons (Protection of Rights) Bill ensuring certain basic rights and standard of living in society. The policy makers have tried their best to protect the rights of transgenders in the country but the social biases against them cause hindrances in the implementation. Even after their existence since ancient times they fail to associate themselves with the society and carry the social baggage which pushes them away from the boundaries of civilised society to a more miserable life.

The country has celebrated victories over the past years, recognizing transgender people for who they are and empowering them through judicial rulings and legislations. The Transgender Persons (Protection of Rights) Act, 2019 protects the interests of the community in terms of enjoyment of employment, education, healthcare, access to public goods and facilities without any discrimination. There are key provisions in the bill which ensure that any person belonging to the transgender community is not deprived of employment opportunities. It provides for vital facilities (like bathroom access, etc.) and appointment of a complaint officer for a proper redressal mechanism. Discrimination towards the third gender is not unknown in Indian society; in the light of this, the court has recognised the rights of third gender to live with dignity enshrined under Article 21(1) of the Constitution.

The new Occupational Safety, Health and Working Conditions Code, 2020 also takes care of health and working conditions of the transgenders and puts an obligation on the employer to provide separate washrooms, bathing areas and locker room for transgenders at workplace [24]. There have been legislations in the past and there will be legislations coming up in the future, it is of importance that legislative developments are taken into account and effectively implemented.

Protecting and providing rights is not the only solution but addressing the underlying social issues is of greater importance. Prior to the new labour codes, The Equal Remuneration Act, 1976 existed, which made it mandatory for the employers to maintain a register of workers along with their details. However, the form was only addressed to the male and female gender. The Supreme Court of India has clarified at instances that Constitution of India prohibits discrimination in all matters of

employment by state [25]. The Section 3(c) of Transgender Persons (Protection of Rights) Act, 2019 prohibits unfair treatment and Section 9 of the said act provides for protection from matters of discrimination during employment which also covers promotion along with recruitment. However, there is no effective remedy that is provided in the act.

Many companies in India including Infosys, Accenture, Sodexo have come up with new policies to accumulate the marginalised community in their formal workplace [26]. Skill gap becomes an apparent challenge and comes into light prominently, in making a gender inclusive workplace. Even when companies want to grow and become inclusive, it becomes difficult because of the social exclusion that transgender people face from the very beginning. The official statistics available is of 2011 which is a decade old but according to the census of 2011, India's trans population consist of 4,90,000 people; out of which, only few of them gain employment [27]. In the year 2017, when Kochi Metro Rail Limited employed 23 transgenders, 8 of them quit within a month due to refusal by several landlords to give them accommodation [28]. The first study on the rights of transgenders by the National Human Rights Commission states that about 92% are deprived of their right to be a part of any economic activity [29]. Here again, underlying social reality comes into play and the social condition pushes back and suppress the opportunity provided by the government.

India's corporate structure through recent years has tried to diversify their workforce by including and giving representation to transgender in their workforce. They are still not emerging as leaders or someone whose voice is heard which fails the point of inclusivity. There is a need for socially disadvantaged transgender people to be upskilled and hired by companies in a non-discriminatory manner. Until the gap between legal provisions and their implementation by companies is filled through their corporate social responsibility role, the problem will persist.

CONCLUSION

This study perceives the instilled patriarchy and hegemonic masculinity in the Indian society as the root cause of gender inequality which leads to gender discriminatory behaviour at various levels. Initiating a gender inclusive culture means initiating change from the ground level, it should not be done just to comply by the rules. The existence of gender stereotypes and bias at a workplace can only be settled by making inclusivity the need of the hour. The onus of reforms does not fall on the companies but the labour laws to provide gender inclusive provisions and delegate powers for effective implementation of the same. The law needs to be dynamic and should be addressing the underlying social realities of the society. Providing equal pay and maternity leave to every employee irrespective of their gender are just small steps towards an equitable future.

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