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Workplace equality in India

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Introduction

The World Bank's [report](#) on Women, Business and the Law 2021 notes that, on average, women benefit from three-quarters of the rights that men have.

Various factors contribute to gender inequality, including social background, mindsets and lack of awareness. In India, as a largely patriarchal society, gender inequality is often evident from childhood. Freedom of movement, education and choice of marriage is often more limited for girls. These inequalities also translate into adulthood, and women's social and professional life.

While gender inequality needs to be addressed both inside and outside the workplace, this article focuses on this subject in a workplace context.

Gender equality through legal lens

Under the Constitution of India, "equality" is a fundamental right guaranteed to all citizens. The state is prohibited from discriminating against anyone on the basis of race, caste or sex and has the obligation to provide equal opportunities to all citizens. The constitution also allows the government to take special measures for the benefit of women. However, the provisions under the constitution can only be enforced against the state and do not apply to private companies, requiring the enactment of special laws that apply to the wider population.

Efforts have also been made to ensure representation of women and transgender people in law-making bodies as well as in the policy wings of the government. Over the years, as a nation, India has made significant progress to improve the participation and retention of women in the workforce by enacting several progressive laws that also apply to private sector employment.

The Equal Remuneration (ER) Act 1976 is the primary legislation on this subject. It is mandatory for employers to ensure equal salaries are paid to men and women doing the same work or work of a similar nature. The ER Act prohibits discrimination against women in matters of recruitment, training, transfers and promotions.

The ER Act presently only protects women and does not expressly prohibit positive discrimination in favour of women over male employees (or employees of other genders), which has been used by some progressive employers to give preference to female candidates. The proposed Code on Wages 2019 (the Wage Code), as and when it is implemented, will subsume the ER Act and expand it further, by doing away with the binary notion of men and women and making the existing provisions gender neutral.

India has long had the Maternity Benefit (MB) Act 1961, which guaranteed women with a 12-week employer-sponsored paid maternity benefit. The MB Act was amended in 2017 to make it one of the most generous in the world, with female employees now entitled to 26 weeks of paid maternity leave for the first two children, access to childcare, adoption and surrogacy leave. The MB Act also expressly prohibits an employer from dismissing female employees during their maternity leave. It is also unlawful for an employer to vary the conditions of service of female employees to their detriment while they are on maternity leave.

More recently, the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013 (the POSH Act) also introduced a requirement for employers to provide women with a workplace that is free from sexual harassment. Obligations include:

- establishing a policy;
- setting up an internal committee to investigate grievances;
- carrying out regular trainings; and
- publicly reporting of statistics on the number of sexual harassment grievances raised and handled every year.

The judiciary has also made important observations on different aspects of maternity leave and childcare. In a recent judgment, the Supreme Court sought to protect women's participation in the workplace by emphasising the need for balance between the right to maternity benefit and the right to work. The Court stressed the fact that social legislations in the country must be purposively interpreted and should not stick to literal bounds to be able to bridge the gap between law and society. Further, as a stepping stone towards the recognition of "atypical" family structures in India, the Court observed that familial structures may change (eg, take the form of unmarried partnerships or queer relationships) and courts in such situations will need to give effect to the purpose of law in question rather than to prevent its application.



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This judgment suggested (this was not a binding part of the order) that employers would need to keep in mind redefined familial roles while extending employee benefits, such as a woman requiring maternity leave to care for her partner's children, an unmarried couple or a single household wanting to adopt a child, or an LGBTQIA+ person wanting to start a family of their own. The court suggested that employers would also need to embed these redefined inclusions of family structures in their corporate social responsibility strategy to help deliver equal opportunities and create a non-discriminatory work environment.

Laws such as the Factories Act and state specific Shops and Commercial Establishments Acts have long required employers to follow special security and other measures to hire women employees during night-time hours, with a view to encourage women participation in the workplace.

India has also enacted special laws that prohibit discrimination against persons with disabilities and transgender people in any matter relating to employment, and employers are expected to establish a robust complaint redressal mechanism for dealing with complaints in this respect.

What can still be done?

India still has a long road ahead to achieve true gender parity and workplace inclusivity.

Labour force [surveys conducted in 2020-21](#) show that the estimated worker population ratio for men and women was 73.5% and 31.4%, respectively. World Bank data pegs the national estimate for [female labour workforce participation](#) at around 19%.

While the legal framework discussed above is meant to increase participation of other genders in the workforce, effective implementation of many of these laws is yet to occur. For instance, though the ER Act mandates equal pay for equal work and aims to create anti-discriminatory employment standards, the penalties for non-compliance are low and so is the rate of enforcement.

Research shows that in the last decade, there have been roughly 16 reported rulings under the ER Act (mostly around procedural non-compliances) and none of them seem to directly deal with substantive issues such as discriminatory hiring practices against women or pay inequities. Unlike a few other countries, employers in India do not have to undertake pay-equity audits and publish their results, which can be a significant self-correcting mechanism.

Similarly, while the provisions under the MB Act are well intended, coupled with poor enforcement of the ER Act, discrimination against women at the time of hiring often goes unchecked – especially in entities that may not be professionally managed. The apprehension of having to extend six months of fully paid maternity benefit without any financial support⁽¹⁾ from the government can often prove to be a gating issue at the time of employment – especially for smaller businesses who avoid hiring female employees altogether.

Recently, the Supreme Court dismissed a public interest lawsuit that sought directions to be issued to all state governments, requiring them to extend special "period leave" to women. The judges agreed with submissions made to the effect that a directive of this sort may dissuade prospective employers from hiring women for jobs, making this a matter of significant debate in recent weeks. There are other areas today where employers are required to undertake additional – and potentially onerous - compliance burdens to hire women – for example, seeking government permission to employ women in night shifts and taking up complete responsibility for their safe transport to and from work. Shifting the legal and financial burden of what is essentially a state function (ie, to ensure safety and security of all citizens) to a private employer, could result in employers being dissuaded from hiring female employees.

In relation to overall inclusivity, while companies in India have moved to implement equal opportunity policies, enforcement mechanisms under laws as such the Persons with Disabilities Act or the Transgender Persons Protection (TG) Act are vague. There is significant ambiguity on how individual grievances can be handled and whether the authorities actually have the power to pass binding strictures. Further, most states have not yet appointed relevant authorities to implement these laws, leading to overall poor implementation and awareness. In particular, the TG Act seems to suffer from loopholes where even powers of enforcement against private companies are questionable.

Comment

While India fares reasonably well on women's right on a global scale, there is still scope for improvement. The government should actively consider introducing parental leave in India, so that men get the chance to play an equal role in child-care and women alone are not viewed as potential financial liabilities by employers anymore. To ease the cost burden on employers, the benefits can be capped in monetary value, be partly state sponsored and/or structured such that employers enjoy other financial incentives such as incremental tax cuts on parental benefits.

There is need for more well-defined anti-discrimination laws, which make it illegal to enquire about matters such as marital status and maternity plans at the time of hiring. Laws should be introduced to prohibit inquiring about the salary earned in previous employment. Such a practice is rampant in India, and this information is often used to benchmark offers, rather than principles of pay-equity within the organisation. Such a law would go a long way in ensuring better pay parity for all genders. Awareness and enforcement of such laws would also need to be drastically improved.

Increased acceptance of remote working has also opened up newer opportunities for greater female and other gender participation in the workforce. Increased adoption of flexible working norms by employers (supported by enabling legislation that is presently missing) is likely to further improve female participation in the workforce, who may find it easier to achieve a balance between their professional and personal responsibilities.

Such changes along with better awareness and reforms in other areas such as property and inheritance rights in favour of women and other genders, will be crucial to achieve better gender equality in India.

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Endnotes

(1) Only women earning below 21,000 rupees per month (less than \$255) are covered by the Employees State Insurance Act, which provides a state insured maternity benefit. The contributions for this are partly sponsored by the employer and partly sponsored by the employee. Any well-paid female employee must consequently receive her maternity benefit entirely at the employer's cost.