
LEGISLATIVE IGNORANCE: DISDAIN TO NON-BINARY GENDER

Anuj, Ideal Institute of Management and Technology, GGS IP University, Delhi

Priyanshi Chaudhary, Advocate, Delhi

ABSTRACT

This Article stipulates the discrepancies and irregularities in the policy making on the principles of the Indian Constitution, different legislations and overall statutes governing the society. This article elucidates lacunae left out by Article 12 not including the private industries and Article 39 providing for equal pay but its legal enforceability is mere obligatory under the head of Directive Principles of State Policy. Moreover, this Article also explains the Laws and separate legislations enacted by the Legislators in order to combat the gender discrimination at workplace, which includes the Equal Remuneration Act, Maternity Relief Act and other such similar Acts. This Article specifically deals with different types of discriminations against women at workplace, positively this also includes the discrimination against the third gender which is carried out not only by individuals but also by the State itself by enacting non inclusive legislations. That this study revolves around whether these legislations are actually and effectively social beneficial legislation or not. Furthermore, it also provides a conclusion as to what the current situation of the Law is and what changes are required to enhance its effectiveness.

CONSTITUTIONAL LIMITATIONS ADVANCING GENDER DISCRIMINATION AT WORKPLACE

Articles 12 and 14¹ of the Indian Constitution, in particular, offer a foundation for advancing equality and a shield to people from prejudice. The jist of these articles can be followed as Article 14 ensures equality before the law and equal protection under the law, and Article 12 defines the "State" which lists the statutory and non-statutory bodies falling under the purview of the Indian Constitution. The fact that, these lists aid and create authorities which are under control of the State and encumber privately nurtured organisations which are not owned or controlled by the State, however, is a serious limitation and leaves a gap in the discussion of gender inequality in the workplace.

The definition of "State" under Article 12 is essential for establishing the circumference of constitutional rights guaranteed by the Indian Constitution because it defines the "State" that includes the governments, local authorities, and other organizations that represent the State. Private organisations which are not covered in the header of "other authorities" of the Article 12, are not included in this definition, though, so they are not subject to the subscription to the same constitutional principles as the State owned and controlled bodies. The consequence of limited scope of Article 12 is the absence of responsibility for private organisations which spurred them into actions that could tend to gender bias and discrimination, vexating the fear of constitutional penalties.

Without the legal safeguards, that are enjoyed by employees of the public sector, women and other marginalized groups frequently face discrimination in recruiting, promotions, and compensation in these sectors. Article 15 forbids discrimination based on gender, caste, religion, or other factors and guarantees that everyone is treated equally under the law. Article 16 seeks to level the playing field, especially when it comes to employment and opportunity access. Its application is restricted to State functions, though, which makes it difficult to enforce gender equality in the private sector. Owing failure to the interpretation difficulties in the past, the Judiciary has understood Article 14 as primarily applicable to State functions, excluding private enterprises from its jurisdiction. Private businesses can thereby enact discriminatory practices without worrying about a constitutional lawsuit. Due to this

¹ INDIA CONST. art. 12, § 14.

restriction, recruiting procedures and opportunities for women to grow in their careers are influenced by biases, which has significant effects on economic development of women.

The practices retaining inequality and retarding equality of gender in private sectors render to gender disparity persistence since private sector workers do not have direct constitutional safeguards. The following problems stand out in particular:

1. **Discriminatory Behaviour:** Biases against women are frequently maintained in private sectors, particularly in positions of leadership. Male candidates may be given preference in hiring decisions, which would reinforce preconceived notions about women's abilities and fitness for difficult positions.
2. **Gender Pay Gap:** This topic is still very much alive. The equality protected by Article 14 is regularly undermined when women are paid less for doing the same work as men. In the absence of a legislative framework which should include all the Genders, this disparity keeps growing.
3. **Fewer Prospects for Promotion:** Due to long-standing prejudices, women frequently encounter obstacles to career advancement and promotions. The glass ceiling is reinforced by discriminatory practices that continue to exist in private industries due to a lack of oversight, accountability and legislative advancement.

Case Laws such as, *Vishakha v. State of Rajasthan* (1997)², by addressing the evil of sexual harassment in the workplace, this historic ruling established rules to make workplaces safer for women. In establishing a precedent for dealing with gender based discrimination, the Supreme Court underlined that the State must protect women's rights under Article 15 read with Article 14 and Article 12. By the decision of *Ashok Kumar v. Union of India* in 2010, the Supreme Court held that gender-based wage discrimination is against the equality principles outlined in Articles 14 and 16³. The demand for accountability in the public and commercial sectors was strengthened by this case, which emphasized the need for equal compensation for equal labour. The court in *Nirmal Singh v. State of Haryana* (2011)⁴ emphasized the importance of women's representation in all fields and ruled that gender

² *Vishakha v. State of Rajasthan* AIR 1997 SUPREME COURT 3011.

³ INDIA CONST. art. 16.

⁴ *Nirmal Singh v. State of Haryana* (2011) AIR 2011 SUPREME COURT 453, 2011 (2 SCC 160).

discrimination was illegal. The necessity of affirmative action in securing women's employment was highlighted by this case. Furthermore, the case of *Uttar Pradesh government v. Lalita Kumari* (2013)⁵, even though the case mostly dealt with the police's requirement to file formal complaints, it also highlighted the significance of tackling gender based violence and harassment and reaffirmed the state's duty to safeguard people's rights in all spheres of life. Legal and Legislative Reactions Several legislative and judicial initiatives have been undertaken to remedy these constitutional limitations.

The legislations such as the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 aims to make private sector workplaces safer for women. However, many women are not aware of their rights under these rules, and enforcement is still uneven. However, the role of Judicial Activism in reigniting the issue that gender discrimination can take place in both public and private enterprises is enlightening, where the judiciary has on occasions broadened the interpretation of constitutional rights to encompass private organizations into the scale of constitutional principles. For example, even though the private sector is not directly governed by Article 12, certain decisions have emphasized the necessity of equal treatment there too. This is implemented in the form of changing workplace culture and facilitating it by introducing training programs and increasing awareness of gender equality in private enterprises. Such programs can encourage inclusivity and dispel preconceived notions against the sector facing discrimination.

Lastly, one major obstacle in attaining gender equality in the workplace is the restrictions placed on private companies by Articles 12 and 14 is the lack of explicit constitutional duties for private companies not discontinuing discrimination, despite efforts by legislative actions and court rulings to address these problems. In order to create a more equal workplace, substantial reforms that improve legal protections and encourage cultural changes in private industries are essential.

In conclusion, the Indian Constitution provides a strong basis for equality; but, its implementation to the private sector is lacking, which needs to be fixed to guarantee that all workplaces respect the values of equal opportunity and non-discrimination for all people,

⁵ *Uttar Pradesh Government v. Lalita Kumari* (2013) AIR 2014 SC 187

regardless of gender. The future of women and other marginalised groups in the labour will be more egalitarian if constitutional provisions and court interpretations interact.

ORIGIN OF CONCEPT OF GENDER EQUALITY

The fight for gender equality in the workplace has a long history and has changed dramatically over time. Some cultures, like ancient Egypt and Sparta, supposedly assuming their forcefully implied authority as their right, permitted women significant rights and economic freedom, even though strict gender roles frequently restricted women to the households. However, as women joined the workforce and fought for equal rights during the industrial revolution and feminist movements in the 19th and 20th centuries, the modern idea of gender equality gained hold. In India, the efforts to attain gender equality in the workplace are supported by a number of constitutional provisions, particularly Articles 39(d), 42, 43, and 43A⁶.

In order to eliminate wage gaps and uphold the ideal of fairness in employment, Article 39(d) expressly requires equal compensation for equal work for both men and women. Women's economic empowerment, financial independence, and social standing are all greatly improved by these Articles. The State's obligation to provide fair and compassionate working conditions, including maternity benefits, is emphasized in Article 42. This clause, which acknowledges the particular difficulties faced by women in the workforce, is essential for advancing gender equality. In order to lessen economic gaps that frequently disproportionately affect women, Article 43 aims to guarantee workers a living wage and respectable working conditions.

The case of *J.K. Industries v. State of U.P.*⁷, 2007, the Supreme Court reinforced the need for equitable pay by highlighting the significance of equitable compensation for both genders. Employee involvement in management is encouraged under Article 43A, which also encourages inclusion in decision making. This clause encourages more women to assume leadership positions, which may result in more workplace regulations in favour of equity.

To sum up, Articles 39(d), 42, 43, and 43A work together to provide a strong foundation for advancing gender equality in Indian workplaces. The judicial commitment to upholding these

⁶ INDIA CONST. art. 39(d), § 42, § 43, § 43A.

⁷ *J.K. Industries v. State of U.P.* (2007) 13 SCC 673

laws is demonstrated by the case laws that goes along with them, which contributes to the development of a more equal and inclusive workplace for people of both genders.

THE SUBSTANTIAL FRAMEWORK TO IMPLEMENT GENDER EQUALITY AT WORKPLACE

The Constitutional framework propounding gender equality at workplace includes the Directive Principles of State Policy (DPSP), enshrined in Part IV of the Indian Constitution, guide the government in promoting social and economic justice. While they are not legally enforceable, they aim to create a framework for the government to ensure the welfare of citizens, including gender equality. Several DPSPs indirectly promote gender equality, especially in the context of the workplace. Key provisions that are relevant to gender equality at the workplace include:

Article 39(a)⁸ - Equal Justice and Free Legal Aid

Relevance to Gender Equality at Workplace: This provision advocates for equal access to livelihood opportunities for both men and women, which includes equal access to employment, opportunities, and fair wages in the workplace. It underlines the need for ensuring equal opportunities in professional life.

Article 39(d) - Equal Pay for Equal Work

Relevance to Gender Equality at Workplace: This is one of the most direct provisions promoting gender equality at the workplace. It calls for equal pay for equal work, addressing wage disparities between men and women, which is a significant issue in many sectors.

Article 42 - Provision for Just and Humane Conditions of Work and Maternity Relief

Relevance to Gender Equality at Workplace: This article mandates the creation of a working environment that is fair and humane, including provisions for maternity benefits, rest periods, and other health and safety measures. It directly supports women's participation in the workforce by recognizing their special needs during pregnancy and childbirth.

⁸ INDIA CONST. art. 39(a).

Article 15(3)⁹ - Special Provisions for Women

Relevance to Gender Equality at Workplace: This article allows for positive discrimination in favour of women and transwomen, enabling the government to implement policies that benefit women specifically in the workplace, such as quotas, maternity benefits, special workplace protection laws, and equal employment opportunities.

Article 16(2)¹⁰ - Prohibition of Discrimination in Employment

Relevance to Gender Equality at Workplace: This provision explicitly prohibits discrimination on the grounds of sex (gender), ensuring that women and transgender have the same rights as men in relation to access to public employment. This supports gender equality in hiring, promotions, and treatment at the workplace.

The Directive Principles of State Policy (DPSP) provide the constitutional foundation for ensuring gender equality at the workplace in India. Specifically, they promote equal opportunities, equal pay for equal work, humane working conditions, and special provisions for women's welfare. Though these principles are not enforceable by law, they guide legislative and executive action and provide a framework for policies that can help create a more equitable work environment for both men and women.

THE PROCEDURAL LEGISLATION ADVOCATING GENDER EQUALITY AT WORKPLACE

The procedural framework benefitting the women strata was drafted and enforced later through various legislations but the inclusion of the transwomen is still a topic of negotiation.

The Equal Remuneration Act, 1976¹¹

Key Provisions: It prohibits discrimination on the grounds of gender in matters related to remuneration, benefits, and terms of employment.

Impact: It aims to close the gender wage gap by ensuring that women are not paid less than

⁹ INDIA CONST. art. 15(3).

¹⁰ INDIA CONST. art. 16(2)

¹¹ The Equal Remuneration Act, 1976, § 2(a)(1), No. 25, Acts of Parliament, 1976(India).

their male counterparts for performing similar tasks. But are they including transwomen in it is still invisible.

The Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act, 2013¹²

Key Provisions:

It defines sexual harassment and provides guidelines on how complaints should be addressed. It requires employers to ensure a safe working environment free from harassment. It mandates training and awareness programs for employees.

Impact: The definition of “aggrieved women” given in Section 2 (a)(i) as “in relation to a workplace, a woman, of any age whether employed or not, who alleges to have been subjected to any act of sexual harassment by the respondent” does not include transwomen. However, the judicial precedent of *NALSA v Union of India*, 2014¹³ extended this right to transwomen. But this does not provide judicial or other form of redress to them furtherly and the same cannot be seen evidentiary in the catena of judgments.

Maternity Benefit Act, 1961 (Amended in 2017)¹⁴

Key Provisions:

It grants women, working in organizations with 10 or more employees, 26 weeks of paid maternity leave. It ensures the right to maternity leave for adoptive and commissioning mothers. It provides for crèche facilities in organizations with 50 or more employees to facilitate working mothers.

Impact: This law helps in balancing work and family life for women and supports them during pregnancy and early motherhood. But even in the era of medical science advancements like IVF facilitating transwomen, law is still static towards development of transgender and unable to recognise them as mothers.

¹² The Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act, 2013, No. 14, Acts of Parliament, 2013(India).

¹³ *NALSA v. Union of India* (2014) 5 SCC 438

¹⁴ Maternity Benefit Act, 1961, No. 53, Acts of Parliament, 1961 (India).

The Companies (Appointment and Qualification of Directors) Rules, 2014¹⁵

Key Provisions:

It requires public companies with a paid-up capital above a specified threshold to have at least one woman on their board of directors.

Impact: This rule encourages greater female participation in corporate decision-making and leadership positions. But again it forgets about the rights of transwomen.

The Factories Act, 1948¹⁶

Key Provisions:

Women are prohibited from working in factories during night shifts. It provides for adequate restrooms and separate facilities for women workers.

Impact: The Act ensures the safety, health, and welfare of women working in factory environments. But these rights are enjoyed by the transwomen or not is still in question.

Workplace Gender Equality Initiatives

Government Schemes and Policies: The government has launched several schemes like Mahila E-Haat (an online marketing platform for women entrepreneurs) and Stand-Up India Scheme to promote women's entrepreneurship and economic participation.

Private Sector Initiatives: Many private companies have implemented policies and practices to ensure gender equality, such as:

1. Flexible working hours and remote work options to help women balance family and work responsibilities.
2. Diversity and inclusion training to sensitize employees about gender biases and stereotypes.

¹⁵ The Companies (Appointment and Qualification of Directors) Rules, 2014(India).

¹⁶ The Factories Act, 1948, No. 63, Acts of Parliament, 1948 (India).

3. Ensuring equal career growth opportunities for both men and women through mentorship and leadership programs.

The implementation of the schemes and policies concerning transwomen are still lacking behind and the same can be seen by latter illustrated example.

For Instance: Inequalities under the Equal Remuneration Act (ERA)

The Equal Remuneration Act hereinafter for brevity as “ERA,1976” of India, which was enacted in 1976, aims to ensure equal pay for equal work, regardless of gender. However, it has certain shortcomings with regard to transgender individuals:

1. Lack of explicit inclusion of Trans-genders in the policies of ERA,1976.
2. Limited legal protections are given in the Transgender Protection Act,2019 but the same is ignored in the policy making of the ERA, 1976.
3. Social and cultural bias are long standing practices against transgender and the same can be curtailed by the proactive role of State only.
4. The ERA’s focus on binary gender categories (male and female) fails to account for the experiences of transgender people in the workforce.
5. The implementation and enforcement of the ERA,1976 are weak, and without specific provisions for transgender workers, they may face challenges in seeking redress for wage discrimination.

The State demonstrating its role of Welfare State as prescribed by the DPSPs of Indian Constitution, formulated enormous policies and social beneficial legislations. But these legislations are somehow limited to men and women and not bringing the issue of Trans-genders’ rights to upfront. Although the state has not tried to include transgender in the purview of earlier legislations enacted to promote and harmonise uniformity among various genders. The State has tried to create such beneficial legislations in pursuance of NALSA v Union of India, 2014 by enacting the Transgender Persons (Protection of Rights) Act, 2019. However, the implementation has not taken the successful turn to the road of uniformity having equality as its destination.

In furtherance to the said Act, the State has brought the **Transgender Rights at Workplace Policy 2024** in India which aims to create a more inclusive and equitable work environment for transgender individuals, addressing key issues like discrimination, harassment, and unequal treatment based on gender identity. Key features of the policy include non-discrimination, equal opportunities, inclusion and accessibility, harassment-free environment, confidentiality and privacy, training and awareness, healthcare and benefits, legal compliance.

Overall, the **Transgender Rights at Workplace Policy 2024** seeks to promote dignity, equality, and inclusivity for transgender individuals in the workforce, enabling them to participate fully in the economy without facing discrimination or marginalization.

CONCLUSION

On the basis of all the above mentioned cases, legislations and Constitutional provisions there is one thing certain, which is the fact that despite all the irregularities in the legal framework, the Legislators and the Judicial Activism has helped in combating discrimination at workplace significantly. But after considering everything, in the author's personal view, it would be justified to say that the action taken up by the legislation is still manifestly violating the principle of equity. This view can also be inferred from the fact that even in the year 2024, the laws are only restricted to binary genders, which thereby does not include the third gender. Furthermore, neither the Constitution nor the Equal Remuneration Act include the third gender namely, into their purview of juridical work. The legislative Acts were enacted merely to stipulate their fundamentally guaranteed rights by way of the 2019 Act and the policy of 2024. Therefore, it can be concluded that there are certain developments still needed in the legal framework in order to call any Law, a social beneficial legislation.