

## Wage Discrimination on the Basis of Gender: An Analysis of Indian Legal Position

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### Abstract

Indian women have been treated differently since time immemorial. Even after independence, women were discouraged from doing many things and were deemed as caretakers of the home. Gender pay gap in India refers to the difference in earnings between women and men in the paid employment and labor market. Article 39 envisages that all states ideally direct their policy towards securing equal pay for equal work for both men and women, and also ensuring that men and women have the right to an adequate means of livelihood. Every one has the right to work to free choice of employment to just and favourable condition of work and protection against unemployment. The judiciary can bring important changes in society when the judiciary operates without gender bias and supports gender equality. women's and men's earnings may shift slightly each year with each new batch of Census Bureau data, the gender wage gap will not close anytime soon without concerted action. Efforts to close the wage gap must address the varying drivers of it as well as the multitude of biases.

**Keywords:** Wage discrimination; Directive principles; Gender; Act; Constitution; Code of Ethical.

## INTRODUCTION

Indian women have been treated differently since time immemorial. Even after independence, women were discouraged from doing many

things and were deemed as caretakers of the home. This sort of inequality prevailed despite so many goddesses being worshipped in the country. Even today although there is a vast improvement regarding gender equality in comparison to how it was before independence, the mindset of the society towards this is still lacking somewhere. Since the second half of the 20th century, women's labor force participation has grown significantly.

1. Women are working longer hours and pursuing higher education in greater numbers. However, despite this progress, significant wage gaps between men and women persist particularly for women of color. Gender discrimination is unequal or disadvantageous treatment of an individual or group of individuals based on gender. Sexual harassment is a form of illegal

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gender discrimination. The gender wage gap refers to the difference in earnings between women and men.

2. Experts have calculated this gap in a multitude of ways, but the varying calculations point to a consensus: Women consistently earn less than men, and the gap is wider for most women of color. Analyzing the most recent Census Bureau data from 2018, women of all races earned, on average, just 82 cents for every \$1 earned by men of all races.
3. This calculation is the ratio of median annual earnings for women working full time, year round to those of their male counterparts, and it translates to a gender wage gap of 18 cents. When talking about the wage gap for women, it is important to highlight that there are significant differences by race and ethnicity. While the gender pay gap is essentially the average difference between the remuneration received by working men and women, there are more nuances here. There are two distinct numbers: the unadjusted pay gap and the adjusted pay gap. The former simply differentiates between mean and median wages of the two genders, the latter takes into account differences in factors such as occupation, education and job experience. So the difference is starker if you consider the unadjusted figure. An often cited number in this context is the unadjusted salary of the average female in the US, which is supposed to be 78% of the average male salary, whereas the adjusted figure is 80-98%.

## **GENDER WAGE GAP**

The gender wage gap refers to the difference in earnings between women and men. The gender pay gap or gender wage gap is the average difference between the remuneration for men and women who are working. Women are generally considered to be paid less than men. There are two distinct numbers regarding the pay gap: non-adjusted versus adjusted pay gap. The latter typically takes into account differences in hours worked, occupations chosen, education and job experience. In the United States, for example, the non-adjusted average female's annual salary is 79% of the average male salary, compared to 95% for the adjusted average salary. The reasons link to legal, social and economic factors, and extend beyond "equal pay for equal work". The gender pay gap can be a problem from a public policy perspective

because it reduces economic output and means that women are more likely to be dependent upon welfare payments, especially in old age.

Gender pay gap in India refers to the difference in earnings between women and men in the paid employment and labor market. For the year 2013, the gender pay gap in India was estimated to be 24.81%. Further, while analyzing the level of female participation in the economy, this report slots India as one of the bottom 10 countries on its list. Thus, in addition to unequal pay, there is also unequal representation, because while women constitute almost half the Indian population (about 48% of the total), their representation in the work force amounts to only about one-fourth of the total.

According to Bureau of Labor Statistics data, in 2020, women's annual earnings were 82.3% of men's, and the gap is even wider for many women of color. Though women only made 57 cents per dollar earned by men in 1973 when this Department of Labor PSA was made, progress has stalled and we're still far from closing the pay gap.

### ***Causes of Gender Pay Discrimination in India***

There are many reasons behind the gender wage gap or discrimination in India which are listed below.

**Economic inequalities:** Low participation rate in the labour force, gender pay gap, property rights. Although there are laws to protect women's property rights it is weakly enforced.

**Occupational inequalities:** Very few businesses in India are owned by women. There are fewer females in the profession of teachers, scientists and military.

**Educational inequalities:** There is a huge dropout of girls from school education and many of them don't attain higher education.

**Health and Survival inequalities:** Low birth sex ratio of girl child caused by selective abortion due to a preference for the boy child.

Recently some research papers have revealed that women gets paid less than their male counterparts. Possible causes for gender pay gap are:

- a. Prevailing patriarchal mindset among the employers, women do not get respect for their potential.
- b. Lack of awareness among women regarding equal pay norms.
- c. Centuries of disparagement of women in their socio-economic and political roles have

oppressed their bargaining powers.

- d. Preferring men for managerial jobs, as compared to preference of women for lesser demanding positions.
- e. Women have taken this rule of the society in their stride and tend to protest less to protect their jobs or being ridiculed by colleague.

## **WAGE LAWS IN NATIONAL AND INTERNATIONAL CONTEXT**

### ***Constitutional protections***

As part of its Directive Principles of State Policy, the Constitution of India through Article 39 envisages that all states ideally direct their policy towards securing equal pay for equal work for both men and women, and also ensuring that men and women have the right to an adequate means of livelihood. While these Directive Principles are not enforceable by any court of law, they are crucial to the governance of the country and a state is duty bound to consider them while enacting laws.

While “equal pay for equal work” is not expressly a constitutional right, it has been read into the Constitution through the interpretation of Articles 14, 15 and 16 which guarantee equality before the law, protection against discrimination and equality of opportunity in matters of public employment. The Supreme Court of India has also declared this to be a constitutional goal, available to every individual and capable of being attained through the enforcement of their fundamental rights set out in Articles 14 through 16. In a popular Supreme Court decision, the conditions of employment of the air hostesses of Air India were challenged. The terms of employment required the mandatory retirement of females: (I) upon attaining the age of 33; (ii) if they were married within four years of service; or (iii) upon their first pregnancy. The court however struck down these provisions and held them to be arbitrary and discriminatory as it violated Articles 14, 15 and 16 of the Constitution.

### ***Article 23***

Every one has the right to work to free choice of employment to just and favourable condition of work and protection against unemployment. Everyone without any discrimination has the right to equal pay for equal work. Everyone who works has the right to just and favourable remuneration

ensuring for himself and his family an existence worthy of human dignity and supplemented necessary, by other means of social protection. Everyone has the right to form and to join trade union for the protection of his interests.

### ***Equal Remuneration Act, 1976***

In 1976, the Equal Remuneration Act was passed with the aim of providing equal remuneration to men and women workers and to prevent discrimination on the basis of gender in all matters relating to employment and employment opportunities. This legislation not only provides women with a right to demand equal pay, but any inequality with respect to recruitment processes, job training, promotions, and transfers within the organization can also be challenged under this Act. However, its scope does not extend to situations where: (I) a woman is attempting to comply with the requirements of laws giving women special treatment; and (ii) a woman is being accorded special treatment on account of the birth of a child, or the terms and conditions relating to retirement, marriage or death. Companies and individual employers can both be held accountable to maintain the standards prescribed under this Act. In various cases, the Supreme Court of India has also held that discrimination on the basis of gender only arises when men and women perform the same work or work of a similar nature. However, it clarified that a flexible approach is required to be taken while deciding which kinds of work may be similar by considering the duties actually performed as a part of the job, and not the duties potentially capable of being performed.

### ***Ancillary legislation***

While legislation like the Maternity Benefit Act, 1961 and the Factories Act, 1948 do not directly address the issue of equal pay for equal work, they provide certain additional benefits a woman can claim. The Maternity Benefit Act applies to all establishments with more than ten employees. However, in states where the Employees’ State Insurance Act applies, employers no longer have any liability under the Maternity Benefit Act. Under this Act, a pregnant woman worker is entitled to 26 weeks of fully paid maternity leave, and six weeks in case of miscarriage or termination of pregnancy. Pregnant women also have the right to not perform physically arduous work, which may affect their pregnancy, and no deductions can be made from their wages because of this. Additionally, as per the Factories Act, employers are required to provide

childcare for children under 6 years old at all worksites that employ over 30 women.

### *New Code on wages*

Recently, the Code on Wages, 2019 of India (Code on Wages) has been notified and it received the Presidential assent on August 8, 2019. The Code of Wages consolidates four national level labour laws on wages, being the ERA, Minimum Wages Act, 1948, Payment of Wages Act, 1936 and Payment of Bonus Act, 1965.

The first set of provisions of the Code of Wages relates to anti-discrimination, prohibiting discrimination against employees on the ground of gender in matters relating to payment of wages. The Code on Wages also prohibits discrimination while recruiting any employee and in the conditions of employment, except in cases where employment of women in such work is prohibited or restricted under any law.

### *International Obligations*

India has been a permanent member of the ILO Governing Body from 1922. In September 1958, India ratified the C100 Equal Remuneration Convention, 1951 (No. 100), which addressed the issue of equal pay between men and women for work of equal value. This convention requires all member states to direct their national laws and policies towards guaranteeing equal remuneration to all workers, regardless of gender. In an attempt to ensure compliance with this convention and in response to the Report by the Committee on status of women in India, the government enacted the Equal Remuneration Act.

Article 2 of the Universal Declaration of Human Rights (UDHR) states that every human being is entitled to all rights and freedoms without distinction of any kind, such as race, colour, sex, language, religion, political or opinion, national or social origin, property, birth or status. Article 23 of UDHR stipulates that everyone without discrimination has the right to equal pay for equal work. Article 2, 3 and 26 of the International Covenant on Civil and Political Rights (ICCPR) and Article 6 to 8 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) require the respective States parties to guarantee the enjoyment of all rights without discrimination of any kind. Article 7 of the ICESCR not only guarantees equal remuneration for work of equal value but also goes on to be more restrictive by stipulating that the work conditions for women

and men should be alike. Women should not be made to work in inferior work conditions.

Unfortunately, the Code does not define the term 'discrimination' and doesn't delve into the meaning of the term at all. With respect to the law and discrimination, it is relevant to understand the two main types of discrimination, namely direct and indirect discrimination. Direct discrimination occurs when a person is treated unfavorably or unfairly because of an intrinsic personal characteristic that is protected by law, such as sex or gender. Indirect discrimination occurs when a rule, policy or mandate that is seemingly equal and applies to everyone in the same way, but in reality disadvantages a particular individual/group of individuals because of a personal attribute of such individual/group. The workplace is a space where discrimination of both types is amply possible. By not delving into the meaning of discrimination and how women can face discrimination at the workplace, the Code is decidedly narrow in its approach.

Judicial decisions have both an individual and a collective power. They impact the most intimate details of everyday life, and they also shape the identity of the judiciary. Judicial decisions thus play a major role in defining the character of a democratic nation and in giving meaning to the rule of law. Thus, the Office of the President of the Supreme Court of Mexico aims to promote jurisprudential practices that uphold the principle of the right to equality. Such an effort requires generating tools that can help jurists to adjudicate cases with a gender perspective. Law is omnipresent and it impacts different aspects of people's lives. The significance of law and rights in affecting people's lives is increasing with the expansion of the legal domain into public and private spheres. Law helps an individual by providing them the right to enjoy their life lawfully and to live as free and autonomous agents of society. Disparities in access to rights are redressed through rules and institutions established or resulting from such rules, are they social or legal. However, these disparities affect both men and women but women are lagging behind men in many fields. These inequalities could be refusing women the right to acquire, manage, and dispose of assets in their name which restricts their financial opportunities, economic productivity, and bargaining power in the household. Law needs to take into contemplation how differences in women's and men's social, economic, and legal rights affect the way they experience law and justice in their lives.

### Judicial approach in wage discrimination on gender

The judiciary can bring important changes in society when the judiciary operates without gender bias and supports gender equality. The decisions given by the judiciary becomes a norm for all the people in the society through established mediums of state citizen engagement and the influence of the court goes beyond those who come in direct contact with them. However, it is not always that the judiciary is effective in upholding gender equality as a majority of people may not be influenced by the judicial decisions for instance customary laws might govern a lot of people. It is the foremost duty of the courts to decide cases by interpreting the constitution and uphold gender equality in such decisions. Courts have the right to strike down legal provisions that promote discrimination based on gender such as the unequal rights inheritance of properties. The Indian Judiciary has an important role to play in empowering women and establishing gender fairness in a country where gender disparity is prevalent in almost all sectors of society. The Indian Judiciary through his judicial decisions has helped women to get her what is due to her as a matter of right and has shown that discrimination against women in Indian society won't be tolerated at all. The work of the judiciary is to interpret and apply the laws laid down in the constitution. The main objective of the laws is to give justice to the aggrieved. The legislature can draft the legal provisions but the judiciary must implement the laws in such a way that it can give justice to all keeping in mind the principles of equity, justice, and good conscience. The judiciary examines all the provisions and then implements them in the proper places for the development of society.

The recent judgment of the Supreme Court in *State of Punjab v Jagjit Singh (2016)*, which applies the principle of "equal pay for equal work" in the context of temporary employees of the Punjab government, is one such instance. While the Constituent Assembly debates seem to envision the principle expressed in Article 39(d) as one which relates to gender equality in India,<sup>1</sup> the large bulk of cases where this principle has been applied relates to service law cases, that is, cases relating to employees of the union or state governments. The Jagjit Singh case, the judicial approach to "equal pay for equal work" is yet to explore the potential for the application of this principle, and many more facets to this principle require to be elaborated in legislation.

The judicial decisions given by the Indian

Judiciary has affected and brought a lot of important changes in the usual norms of the society.

In another case between *Randhir Singh v. Union of India*<sup>1</sup>, the Supreme Court held that the doctrine of 'equal pay for equal work' is not an abstract but a substantive one and although it is not a fundamental right, it is definitely a constitutional goal.

The Code on Wages, 2019 is an Act that seeks to amend and consolidate the laws relating to wages and bonus, connected and incidental matters to these issues, and absorbs four central legislations namely the Payment of Wages Act, 1936, the Minimum Wages Act, 1948, the Payment of Bonus Act, 1965, and the Equal Remuneration Act, 1976 (ERA). Section 3 under Chapter I of the Code on Wages, 2019 provides for the prohibition of discrimination on the grounds of gender, which reads as follows,

1. 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.
2. *No employer shall:*
  - i. For the purposes of complying with the provisions of sub-section (1), reduce the rate of wages of any employee.
  - ii. Make any discrimination on the ground of sex while recruiting any employee for the same work or work of similar nature and in the conditions of employment, except where the employment of women in such work is prohibited or restricted by or under any law for the time being in force.

A welcome change that this section makes, unlike the erstwhile Equal Remuneration Act, 1976 that specified the binary of men and women, the provision under Code on Wages has replaced 'men and women' with 'gender' thus including other genders, i.e. transgender persons within its ambit as well.

### **THE NEW CODE ON WAGES**

The key points of differential between the ERA and Code on Wages are that while the ERA referred to discrimination against women and between men & women workers, the Code on Wages prohibits discrimination on the grounds of gender, thereby covering the LGBTIQ category as well.

Understanding The Code on Wages, 2019 (In the Context of Pay Equity).

## **DRAWBACKS OF THE CODE**

Unfortunately, the Code does not define the term 'discrimination' and doesn't delve into the meaning of the term at all. With respect to the law and discrimination, it is relevant to understand the two main types of discrimination, namely direct and indirect discrimination. Direct discrimination occurs when a person is treated unfavorably or unfairly because of an intrinsic personal characteristic that is protected by law, such as sex or gender. Indirect discrimination occurs when a rule, policy or mandate that is seemingly equal and applies to everyone in the same way, but in reality disadvantages a particular individual/group of individuals because of a personal attribute of such individual/group. The workplace is a space where discrimination of both types is amply possible. By not delving into the meaning of discrimination and how women can face discrimination at the workplace, the Code is decidedly narrow in its approach.

## **EQUAL PAY FOR EQUAL WORK'**

"Equal pay for equal work," envisioned as a concept of gender justice in the workplace and more, has shrunk to a jurisprudential principle used in service disputes between employees and the government. Even this body of court made law, while laudable in at least protecting the rights of the temporary employees, does not actually further the larger principle in the context of the Indian worker, male or female, who has been abandoned by the state.

Part IV of the Constitution, the Directive Principles of State Policy, lays out the goals towards which the state must work. One of these is contained in Clause (d) of Article 39, namely, "equal pay for equal work for men and women." Over the years, it has become a principle of law used by the courts in India for purposes almost entirely unimagined by the framers of the Constitution. The recent judgment of the Supreme Court in *State of Punjab v Jagjit Singh* (2016), which applies the principle of "equal pay for equal work" in the context of temporary employees of the Punjab government, is one such instance.

While the Constituent Assembly debates seem to envision the principle expressed in Article

39(d) as one which relates to gender equality in India,<sup>1</sup> the large bulk of cases where this principle has been applied relates to service law cases, that is, cases relating to employees of the union or state governments. In this article, I argue that notwithstanding the judgment in the Jagjit Singh case, the judicial approach to "equal pay for equal work" is yet to explore the potential for the application of this principle, and many more facets to this principle require to be elaborated in legislation.

## **CASE LAW**

The judicial decisions given by the Indian Judiciary has affected and brought a lot of important changes in the usual norms of the society.

In the Dharma District PWD Employees Association case, the Court held that there shall be no discrimination based on gender between the workers and they should be paid fairly according to their work and that the Article 39(d) of the Indian Constitution provides for payment of equal consideration both men and women workers for equal same work or work of a similar nature and Article 16 provides that there shall be equal opportunity for all citizens in matters of employment.

### ***Gender pay gap - critical analysis***

As per the World Economic Forum (WEF) Global Gender Gap report of 2018, India is ranked at 108th position out of 149 countries. Iceland topped the list for the 10th consecutive year. Global Gender Gap ranking is concluded taking into consideration many indicators.

In the Wage Equality indicator, India is ranked at 72nd position. In the economic opportunities and participation index, India is ranked very low at 142nd position out of 149 countries. This resulted in the overall reduction of India's rank at Global Gender Gap ranking.

Women on an average are paid 34% less than similarly qualified male workers for performing the same tasks.

Based on the National Sample Survey Office (2011-12) estimates, in nominal terms, women earning a regular salary were paid, on an average, INR 105 and INR 123 less than male workers daily in urban and rural settings, respectively; corresponding figures for casual workers were estimated at INR 72 and INR 47 for urban and rural

workers.

## SUGGESTIONS

- a. Increasing awareness among both the employers and employees regarding equal pay.
- b. The Companies act should be strictly implemented to ensure a particular percentage of women directors in the private/public companies to forward concept of gender parity.
- c. Education sector should be strengthened to impart better values in boys to respect their female counterparts and help in promoting concept of inclusive governance.
- d. Shifting development focus towards labour intensive sectors to create more jobs.
- e. Growth in jobs must be inclusive and new jobs need to be secure with better work conditions, including social security benefits and the right to organise.
- f. Substantially higher investments in health and education are required to improve productivity as these are the sectors which could be large employment generators in the future.

## CONCLUSION

The gender wage gap is real and hurts women across the board. Too often it is assumed that this gap is not evidence of discrimination, but is instead a statistical artifact of failing to adjust for factors that could drive earnings differences between men and women. However, these factors particularly occupational differences between women and men are themselves affected by gender bias. Serious attempts to understand the gender wage gap should not include shifting the blame to women for not earning more. Rather, these attempts should examine where our economy provides unequal opportunities for women at every point of their education, training, and career choices. While women's and men's earnings may shift slightly each year with each new batch of Census Bureau

data, the gender wage gap will not close anytime soon without concerted action. Efforts to close the wage gap must address the varying drivers of it as well as the multitude of biases that hold women particularly women of color, LGBTQ women, and women with other diverse identities and their families back. This is an issue of economic security and equality and women and their families cannot afford to wait for either.

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