

STATE OF DISCRIMINATION

Sub-national comparison of legal barriers to women's
right to choose work in India



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We hope this Report helps Indian states in meeting their commitments towards Sustainable Development Goal 5.1.1 to end legally-sanctioned economic discrimination against women.

Executive Summary

India's female labour force participation rate stands at 18%, three times lower than for men. Were this inequality to be corrected, India's Gross Domestic Product could grow by 27%. Of the factors that influence women's participation in the labour force, laws that affect women's ability to choose work remain the least explored. Research shows that sex-specific legal restrictions negatively correlate with female employment and make it difficult for women to transition into the formal sector. Across countries, removing these restrictions has had positive outcomes for women and economies.

This edition of the State of Discrimination Report measures the extent to which state level restrictions take away women's options to work. The report catalogues state level laws and subordinate legislation that impose restrictions on the employment of women in specific kinds of jobs or during certain hours of the day. Using an analytical framework, the report measures the extent to which Indian states discriminate against women. 23 states are assessed on the preponderance of four restrictions on female jobseekers: (1) working at night; (2) working in jobs deemed hazardous; (3) working in jobs deemed arduous; and (4) working in jobs deemed morally inappropriate.

Table shows the ranking of states on the composite index built in this report.

The State of Discrimination Report aims to give state governments a comprehensive reform agenda, and help the Government of India meet Sustainable Development Goal 5.1.1 to end legally-sanctioned economic discrimination against women. State governments can use this report to identify corrections in law to help increase female employment rates and positively influence female labour market outcomes.

State Rankings on the SoD Index

State	Ranking
Kerala	1
Tamil Nadu	2
Goa	3
Himachal Pradesh	4
Karnataka	5
Bihar	6
Rajasthan	7
Jharkhand	8
Maharashtra	8
Uttar Pradesh	10
Gujarat	11
Andhra Pradesh	12
Madhya Pradesh	13
Haryana	14
Punjab	14
Telangana	16
Assam	17
Tripura	18
Uttarakhand	19
West Bengal	20
Chhattisgarh	20
Meghalaya	22
Odisha	23

Key Findings

What is the state of discrimination against female jobseekers in India?

- Kerala, Tamil Nadu, and Goa provide the greatest freedom for women to choose work.
- Odisha, Meghalaya, Chhattisgarh, and West Bengal impose the most restrictions on women's employment.
- States give the least freedom on the employment of women in jobs deemed arduous. This indicator has an average score of 3.04 out of 100.
- The second lowest performance across states is on the employment of women in factories at night. The average score on this indicator is 27.60.
- States impose the least restrictions on women in jobs deemed hazardous in shops and commercial establishments. The average score on this indicator is 98.47.
- The indicator, 'can women work in licensed country liquor establishments,' records the greatest inter-state variation in scores (standard deviation of 42). There is no variation on the indicator 'can women work in plantations at night', as it is prohibited across all states.
- Employment of women at night is the most heavily legislated subject.
- The Factories Act, 1948, contains the most restrictions of all the laws studied, including on the employment of women at night, the employment of women in jobs deemed hazardous, and the employment of women in jobs deemed arduous.

How do indicators of female labour force participation relate to the state of discrimination?

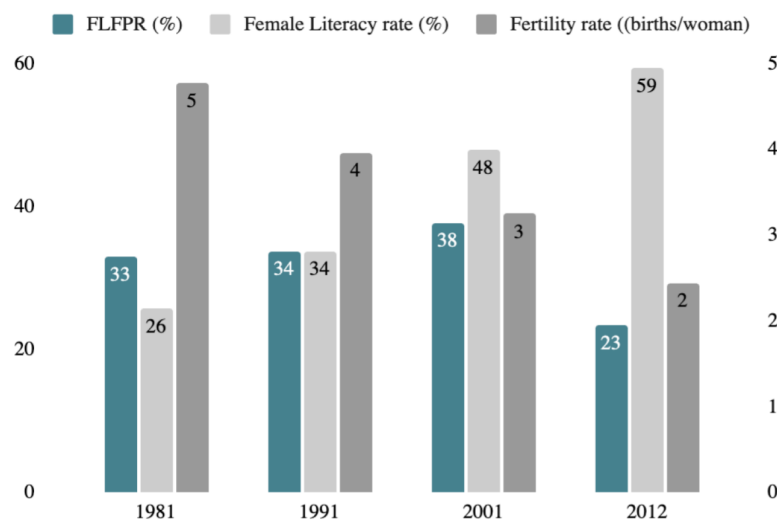
- The average female unemployment rate is 10.39% across states that have above-median ratings, compared to 12.36% in states with below-median ratings.
- The average female labour force participation rate is 38.18% in states that have above-median ratings, compared to 36.09% in states with below-median ratings.
- On average, there are 210 women in managerial positions per 1,000 persons in states with above-median ratings. In states with ratings below median, there are 197 women in managerial positions per 1,000 persons.
- On average, women's salaries are 77.4% of men's salaries in the states with above-median ratings, compared to 67.7% in states with below-median ratings.
- The Sustainable Development Goal 5 (gender equality and women's empowerment) index scores and State of Discrimination Report ratings are positively correlated ($r = 0.44$).

1

Introduction: Bringing women into the job market

Despite being 35.4 crore strong, Indian working women remain woefully underrepresented in the formal economy (Ministry of Home Affairs 2011). Even as the economy has grown, educational attainment has risen, and fertility rates have fallen, women are not participating in the formal economy. Only 24.5% of working age women participate in the labour force (Ministry of Finance 2021). Female labour force participation rates in India are amongst the lowest in the world; only parts of the Arab world fare worse (World Bank Group 2019).

Figure 1.1: Rates over time for female literacy, fertility, and female labour force participation



Female workers are typically engaged in low productivity and low paying work, i.e., they earn low wages in highly insecure jobs (Ministry of Finance 2018). More than half of the employed female population of India is engaged in agriculture (World Bank 2019a). 88% of Indian women employed in the industrial sector and 71% in the service sector are informal employees (International Labour Organisation 2018). India had the largest gender gap in median earnings of

full time employees in 2015 (Ministry of Finance 2018).

Women do not rise up to managerial roles in spite of being better supervisors and workers.

Only 3.7% of Chief Executive Officers and Managing Directors of listed companies in India in 2019 were women (Catalyst 2020). In garment factories, women dominate the frontline workforce in numbers and productivity, yet do not grow to occupy supervisory roles (Afridi, Dhillon, and Sharma 2020). Research also suggests that women employees in commercial establishments are significantly more productive than men (Sengupta, Datta, and Mondal 2011; Elson and Pearson 1981; Afridi, Dhillon, and Sharma 2020; Sharma 2020), and are twice as likely to excel in organisational development and coaching talent (SCIKEY 2020).

India's female working age population is an untapped resource for double-digit economic growth and poverty reduction.

Were India to focus on female economic participation, 264 million more workers could be mobilised and the country's GDP could grow by 27% (Lagarde and Solberg 2018). By mobilising their female workforce towards export-oriented manufacturing growth, many East Asian nations were able to grow at a faster rate than South Asian countries (Klasen and Lamanna 2009). Bangladesh was able to mobilise its female workforce to increase output gains (Klasen 2006). Estimates suggest that equal opportunities for women in India could add USD 700 billion to the economy by 2025, 15.4% of the USD five trillion economy dream (McKinsey Global Institute 2018).

Why did we conceptualise the State of Discrimination Report?

Several factors influence women's decision to not join the workforce: income and employment of family (Klasen and Pieters 2012); marital status, childcare arrangements and safety (Sudarshan and Bhattacharya 2009); women's decisions to continue studying over joining the labour force early (Andres et al. 2017); and domestic responsibilities (Ministry of Finance 2021). Researchers also identify factors that limit the demand for working women in the Indian economy: political disempowerment (Ghani, Mani, and O'Connell 2013); limited job opportunities (Datta et al. 2012); and labour market rigidities (Montag 2013; Das et al. 2015).

In our estimation, the impact of laws on women's employment is the least explored factor that limits the demand for women in the labour market. Rigid labour laws discourage labour intensive manufacturing, affecting women disproportionately (Montag 2013; Standing et al. 1999). Laws that mandate preferential benefits for women prise women out of the market (Hegewisch and Gornick 2011). In addition, sex-based legal restrictions impede the entry of women into the labour market. In this report, we study the last of these factors by documenting and measuring legal discrimination against female jobseekers.

Research shows that sex-specific legal restrictions negatively correlate with female employment and make it difficult for women to transition into the formal sector. The World Bank periodically releases the Women, Business, and the Law Report, a cross country estimation of the extent to which laws affect women's economic inclusion. Legal restrictions hinder female participation by prohibiting them from pursuing some professions or restricting their work hours (Gonzales et al. 2015; Roy 2019) (Ogloblin 1999, 2005; Zveglic and Rodgers 2003). Measures restricting women's hours of work or their opportunities to a subset of industries drive employers to hire only men for jobs that women might otherwise choose.

Research also shows that removing legal restrictions on the employment of women has positive outcomes for women and economies. Allowing women to work at night is positively correlated with the likelihood of women being top managers (Islam, Muzi, and Amin 2018). In Ethiopia, removing restrictions on working outside the home increased the likelihood of women in paid work and in occupations with higher educational requirements (Hallward-Driemeier and Gajigo 2015). Discriminatory laws make it difficult for female entrepreneurs to start formal enterprises (Hyland and Islam 2021).

India has supported the removal of systemic sex-based discrimination on global platforms. India has ratified the Convention on the Elimination of all forms of Discrimination against Women (CEDAW). India is also committed to meeting Sustainable Development Goal 5.1.1 by instituting legal frameworks that promote, enforce, and monitor non-discrimination on the basis of sex.

However, India is still some distance away from meeting these commitments. As on date, more than 50 Acts and 150 Rules across Indian states prevent women from choosing to work. Women in India cannot work at night (after 6 PM), or in jobs deemed arduous (underground mines, lifting heavy objects), hazardous (in at least 27 factory processes), and morally inappropriate (jobs involving sale of liquor).

The State of Discrimination Report aims to give state governments a comprehensive reform agenda, and help the Government of India meet Sustainable Development Goal 5.1.1 to end legally-sanctioned economic discrimination against women. This report aims to generate insights for state governments and create public goods for gender empowerment organisations and researchers.

What can you expect from the Report?

In this report, the researchers catalogue legal provisions that create entry barriers for female jobseekers across India's states. There is currently no exhaustive and verified list of legal provisions that sanction economic discrimination against women at the state level. Using the catalogue, an index is built to show the extent to which different states offer economic freedom to women. The index shows patterns in discriminatory laws, identifies variations across states, and uses this

variation to rank states on the extent to which they legally discriminate against women.

The research team read over 200 laws and subordinate rules and built India-specific indicators based on its reading of the laws. Raw data was verified by experts at Ganesan and Manuraj Legal LLP. The team conducted an extensive literature review to build an analytical framework that captures India's story. The team then created a sub-national index to score the state of discrimination against female job seekers on the extent to which women are free to work at night, or in jobs deemed hazardous, arduous, and morally inappropriate. The team also studied 26 court judgements to understand how courts have approached the question of the constitutionality of such discrimination ¹.

The datasets have been made publicly available so governments, researchers, policy advisors, and issue champions can use the data to inform and make decisions. The team welcomes feedback on the data, methodology, and construction of this set of indicators, and looks forward to improving their coverage.

Why does the Report matter?

As the report will show, most of the discriminatory laws highlighted are based on stereotypes and are outdated. These provisions were conceived in the colonial era and have continued to exist as legacy laws. In deciding the constitutionality of one such provision in [Anuj Garg & Ors v. Hotel Association Of India & Ors](#), the Supreme Court observed, “having regard to the societal conditions as they prevailed in the early 20th century, may not be a rational criteria in the 21st century”. For example, while an average woman may not be able to lift the same weight as an average man, laws make it so that all women for all perpetuity are unable to do so, irrespective of individual ability or willingness.

Existing discriminatory provisions make women kryptonite to employers. They force employers to either hire women for shorter durations, or bear the compliance costs to meet the conditions for hiring women—creches, separate canteen facilities, and recordkeeping. They also make it impossible to hire women in specific occupations, buildings, and even geographical areas. In a notification dated 07 August 2002, the Government of Karnataka recognised that women were an important part of the software development teams which had to work at night, and the prohibition on employment of women during night “has affected working of the IT establishments” (Government of Karnataka [2002](#)).

Well-meaning protective provisions can have adverse consequences. In 1926, Suzanne La Follete warned, “the great difficulty of minding someone else's business... however good one's intentions may be, one can never really know just where that someone's real interests lie, or perfectly understand the circumstances under which he may be most advantageously placed in the way to advance them”. Restrictions placed in the interest of safety and public order may

1. The list of court judgements is available in Chapter 3 of the Report.

inadvertently hold women back. Women restricted from working on sophisticated machinery or factory processes are precluded from the full shop-floor experience. Section 27 of the Factories Act, 1948 prohibits the employment of women near cotton openers. Such a restriction will keep women from learning to run a cotton opener, keep them out of different parts of the factory floor, and even cause them to lose jobs as mechanisation in the garment industry increases. Even an intention such as upholding the dignity of women may come with terrible consequences for women. Estimates suggest that when Maharashtra banned dance bars, it may have led to a loss of 75,000 jobs for women and pushed many towards the flesh trade (The Hindu 2016; Take 2013).

Discriminatory provisions add to the administrative burden of the government. Between 2015 and 2021, the Government of Haryana granted 592 exemptions to factories and establishments from prohibition to employ women at night. To grant these exemptions, the Government of Haryana would have had to scrutinise individual applications, issue approvals, and periodically check if the establishments met the long list of conditions. In a low state-capacity environment, governments have to carefully choose where to direct scarce resources (Shah 2016).

The State of Discrimination Report mobilises the spirit of competitive federalism, to encourage states to correct such legally sanctioned discrimination. India is a union of 28 states and eight union territories. State governments play a critical legislative role in labour markets. Inter-state comparisons can offer insights for context appropriate policies. They can also encourage states to undertake reform following the lead of other states. This report aims to present a reform agenda to state governments, provide data for researchers, and shape the narrative concerning the economic rights of women in India.

2

Findings: Extent of legally sanctioned discrimination across Indian States

Measurement of the State of Discrimination

The regulatory framework in each state determines the extent to which women can choose to work. Many laws treat female workers differently than male workers by limiting their working hours and job options.

This report presents a comparison of 23 Indian states on the extent of sex-based legal discrimination using 48 Acts, 169 Rules, and 20 Notifications/Orders. Data was unavailable for 5 states, i.e. Arunachal Pradesh, Manipur, Mizoram, Nagaland, and Sikkim. They have not been included in the index.

The report contains a de jure analysis of laws on factories, shops and establishments, plantations, contract workers, inter-state migrant workers, and excise. These subjects are regulated by state Acts and Rules/Notifications or union Acts and state Rules/Notifications.

State-level discrimination was analysed on four parameters: (i) working at night, (ii) working in jobs deemed hazardous, (iii) working in jobs deemed arduous, and (iv) working in jobs deemed morally inappropriate.¹ The rationale for selecting these parameters and indicative examples of each are included in Annexure 1. The four parameters were broken down into 11 indicators framed as questions (Table 2.1).

1. In the index/report, the researchers use women to refer to non-pregnant and non-nursing female workers.

Table 2.1: Parameters and indicators used to organise data

#	Parameters	#	Indicators
P ₁	Working at night	P ₁ .I ₁	Can women work in factories at night
		P ₁ .I ₂	Can women work in shops and commercial establishments at night?
		P ₁ .I ₃	Can women work in plantations at night?
		P ₁ .I ₄	Can women contract workers work in establishments at night?
		P ₁ .I ₅	Can women migrant workers work in establishments at night?
P ₂	Working in jobs deemed hazardous	P ₂ .I ₁	Can women work in jobs deemed hazardous in factories?
		P ₂ .I ₂	Can women work in jobs deemed hazardous in shops and commercial establishments?
		P ₂ .I ₃	Can women work in jobs deemed hazardous in plantations?
P ₃	Working in jobs deemed arduous	P ₃ .I ₁	Can women engage in tasks that require lifting heavy objects in the same way as men?
P ₄	Working in jobs deemed morally inappropriate	P ₄ .I ₁	Can women work in licensed country liquor establishments?
		P ₄ .I ₂	Can women work in licensed foreign liquor establishments?

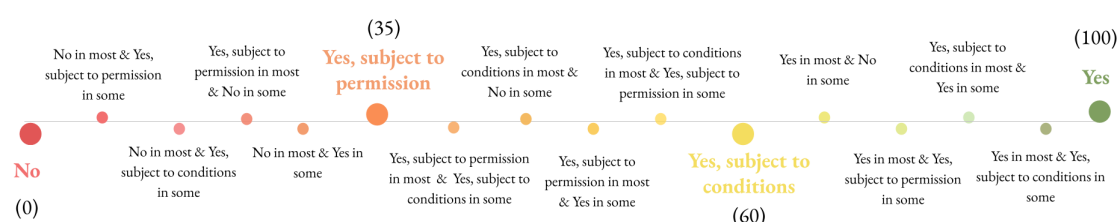
The data could be recorded in four ways based on a state's regulatory approach to giving women the freedom to work (Table 2.2). The answer to the question, 'can women do X' could be 'no', 'yes, subject to permission', 'yes, subject to conditions', and 'yes'. The category 'no' imposes complete prohibition, and the category 'yes' allows complete freedom.

Table 2.2: Possible responses to the question 'can women work in factories at night?'

Regulatory stance	How does the stance manifest?
No	The state government prohibits all factories from employing women.
Yes, subject to permission	If a factory wants to employ women, it will have to individually apply to the state government for permission.
Yes, subject to condition	The state government allows all factories to employ women at night, if they comply with published conditions.
Yes	Factories do not need to take permissions or comply with conditions to employ women.

However, states in India rarely adopt a single regulatory stance. Some states use different approaches for different establishments. For example, Gujarat prohibits the employment of women in most factories at night, but allows female workers in the fish canning and curing industry to opt for night shifts subject to conditions. Using document analysis, the researchers identify 16 possibilities for each of the 11 indicators.

Figure 2.1: Standardised codes and Indicator scoring possibilities



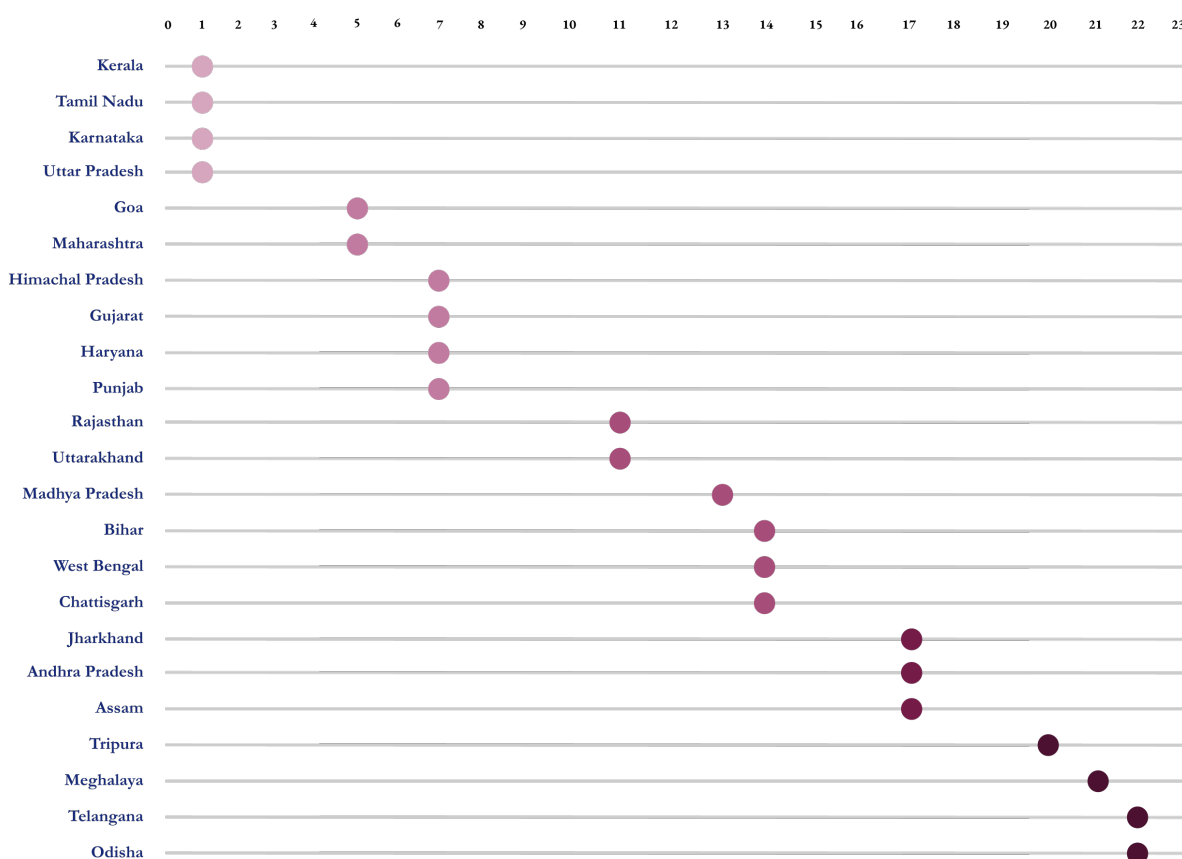
Complete prohibition is assigned the lowest score, and complete freedom the highest score. State-level discrimination is measured by scoring states on all 11 indicators, and converting indicator scores into ratings. The ratings of all indicators under one parameter are averaged to compute the parameter ratings. These parameter ratings are further averaged to yield the ultimate state rank on the index. Annexure 1 details the scoring design.

P1: State performance on freedom to work at night

Prior to the industrial revolution most manual labour had to be halted at sunset. In 1891, India fixed women's working hours in factories at 11 per day by amending the Factories Act, 1881. By 1896, most mills adopted electric light and machinery that could run around the clock. The average working day of men increased from 12 hours to 15 or 16 hours, whereas the working hours of women remained capped at 11 (Sen et al. 1999). In 1921, India adopted [International Labour Organisation Conventions 3 and 4](#) prohibiting the employment of women in factories between 7 PM and 5 AM.²

Restrictions on the employment of women at night feature in multiple state and union laws. Laws restrict women's ability to work at night in factories, commercial establishments, plantations, and as contract and migrant workers. Karnataka, Kerala, Tamil Nadu, and Uttar Pradesh grant the most freedom to women to work at night. Odisha and Telangana place the greatest restriction on the employment of women at night.

Figure 2.2: State rankings on P1: Working at night



Note: Five state (Arunachal Pradesh, Manipur, Mizoram, Nagaland, and Sikkim) have been excluded from this parameter due to non-availability of data across indicators.

2. In 1919, the International Labour Organisation adopted two Conventions on women: No.3 on maternity protection, and No.4 on night work for women.

P1.I1: Can women work in factories at night?

While no Indian state allows complete freedom for women to work in factories at night, eight states allow factories to employ women at night subject to some conditions. Madhya Pradesh and Maharashtra amended their respective Acts in 2015 to grant factories conditions-based exemptions. Assam, Haryana, Himachal Pradesh, Karnataka, Punjab, and Tamil Nadu issued executive orders/ government orders/ notifications to allow factories to employ women in the night shift, subject to conditions. In the pandemic year, Himachal Pradesh revoked the exemption for three months, leaving factory owners and female employees in the lurch.

Figure 2.3: State scores on P1.I1: can women work in factories at night?



Note: Arunachal Pradesh, Manipur, Nagaland, and Sikkim are excluded from this indicator due to unavailability of their Factories Rules.

Two states allow factories to employ women in the night shift subject to permission. Uttar Pradesh amended the Factories Act, 1948 (henceforth referred to as the Factories Act) in 2017 to allow factories to employ women at night subject to the state government's permission. Form 21 of the West Bengal Factories Rules, 1958 prohibits the employment of women between 7 PM and 6 AM, unless factories are authorised to do so by the state government. Nine states completely prohibit the employment of women at night in factories. These states have neither amended their Factories Act, nor issued notifications to remove these restrictions. Five states exempt the fish canning and curing industry from these restrictions due to the perishable nature of the raw material (Mandal 2020). Gujarat and Kerala's exemptions are predicated on conditions, whereas in Goa, Meghalaya, and Tripura the exemptions are subject to permission.

The Factories Act calls for restrictions between 7 PM and 6 AM, but allows states to vary the restricted hours as long as women are not employed between 10 PM and 5 AM. Haryana has been granting case-by-case permissions to this end. In one instance, Haryana changed the restricted hours of an automotive private limited from 7 PM and 6 AM to 10 PM and 6 AM (Government of Haryana 2017).

P1.I2: Can women work in shops and commercial establishments at night?

Goa and Tamil Nadu have no prohibitions on the employment of women at night in shops and establishments that carry on trade, businesses, or professional services. Contrastingly, nine states completely prohibit the employment of women at night in shops and commercial establishments.

Figure 2.4: State scores on P1.I2: Can women work in shops & commercial establishments at night?



Note: Arunachal Pradesh and Mizoram are excluded from this indicator due to unavailability of their Shops and Establishments Act.

Seven states allow commercial establishments to employ women at night if they comply with the conditions laid out by the government, and three states give case-by-case permissions. Andhra Pradesh, Karnataka, Kerala, Maharashtra, Uttar Pradesh, and Uttarakhand require establishments to meet at least 15 conditions to employ women at night; Rajasthan adopted the same regulatory stance via a government order in 2020. To grant permissions, Bihar, Chhattisgarh, and Gujarat require that inspectors be ‘satisfied’ that it is unreasonable to regulate periods of work, that establishments will provide ‘adequate protection of (women’s) dignity, honour and safety’, and that establishments will provide shelters, rest rooms, toilets, and night creches.

Five states exempt some types of commercial establishments from complying with restrictions on working at night. Haryana, Himachal Pradesh, and Punjab allow complete freedom to work at night for women engaged in the care of the sick, infirm, and destitute. So does Jharkhand, for women employed in cinemas and theatres. Telangana granted conditions-based exemptions to Information Technology establishments in 2018.

P1.I3: Can women work in plantations at night?

The Plantation Labour Act, 1951 (henceforth referred to as the Plantation Labour Act), a union law with attached state rules, prohibits the employment of women in plantations between 7 PM and 6 AM, unless the plantations get a state authority's permission.³ Unlike the factories legislation which has been amended by many states, this Act has not been amended by any state.

All states in the index restrict plantations from employing women in the night shift, unless the plantation gets a state authority's approval. Hence, the state scores for all states are 50/100 (i.e. all states permit most and allow some). These states grant the freedom to women working as midwives and nurses in plantations to work at night.

P1.I4: Can women contract workers work in establishments at night?

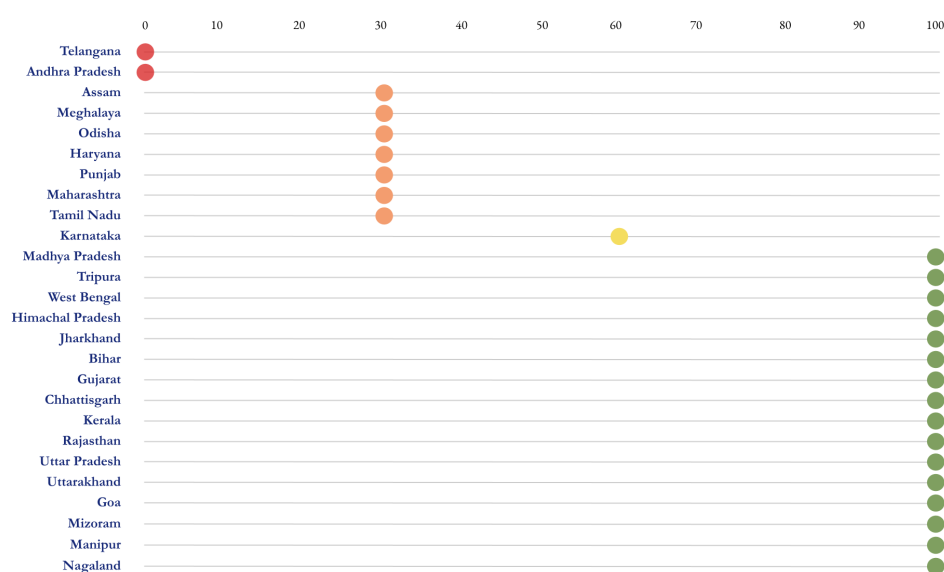
17 states allow complete or partial freedom for female contract labourers to be employed in all establishments at night. Bihar, Chhattisgarh, Goa, Gujarat, Himachal Pradesh, Jharkhand, Kerala, Madhya Pradesh, Manipur, Mizoram, Nagaland, Rajasthan, Tripura, Uttarakhand, Uttar Pradesh, and West Bengal place no restrictions on the employment of female contract labour through their Acts or Rules. Karnataka extends this freedom if employers ensure safety and security conditions. Seven states prohibit many establishments from employing women contract workers at night and exempt some.

The Contract Labour (Regulation and Abolition) Act, 1970 (henceforth referred to as the Contract Labour Act), a union law, empowers state governments to prescribe conditions for grant of licence to employ contract labour. States like Assam, Haryana, Maharashtra, Meghalaya, Odisha, Punjab, and Tamil Nadu exercise these powers in restricting female contract labourers between 7 PM and 6 AM. However, these states allow female contract workers employed as nurses and midwives, or in creches, pithead baths, and canteens to work at night. Odisha allows the Labour Commissioner to vary the restricted working hours such that women are prohibited from working between 10 PM and 5 AM.

Andhra Pradesh and Telangana prohibit the employment of female contract workers at night. However, they allow female contract workers to be employed till 10 PM in factories, if the state government has approved such variation in their working hours under the Factories Act.

3. Plantations refer to any land measuring 25 acres or more which is used to grow tea, coffee, rubber, cinchona, or any other plant notified by the state government, where at least 30 workers are employed.

Figure 2.5: State scores on P1.I4: Can women contract workers work in establishments at night?

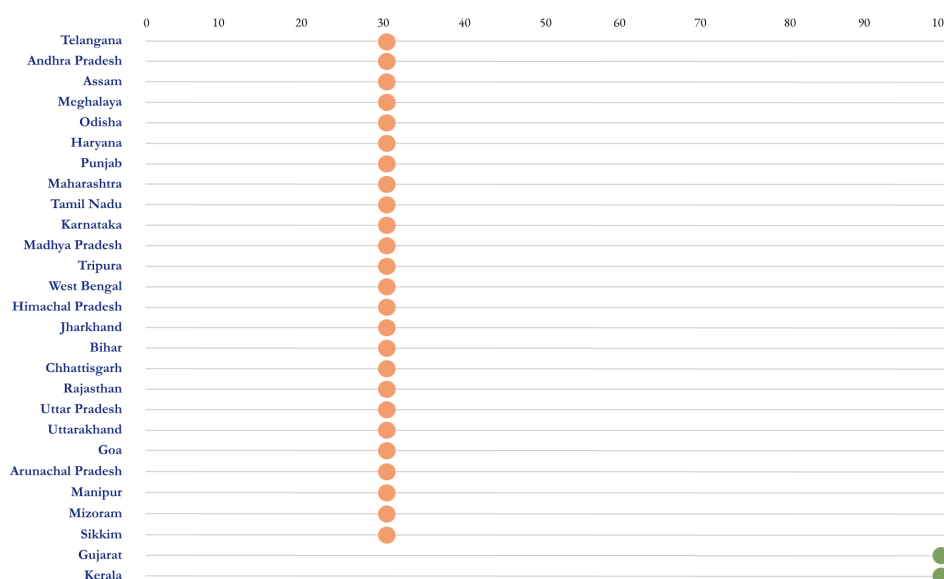


Note: Arunachal Pradesh and Sikkim are excluded from this indicator due to unavailability of their Contract Labour Rules.

P1.I5: Can women migrant workers work in establishments at night?

25 states prohibit most of their establishments from employing female migrant workers at night. These states create these restrictions by including them as conditions for grant of licence. However, the states allow female migrant workers working in pithead baths, creches, and canteens, and as midwives and nurses in hospitals and dispensaries to work at night. Only Gujarat and Kerala grant complete freedom for female migrant workers to be employed at night.

Figure 2.6: State scores on P1.I5: Can women migrant workers work in establishments at night?



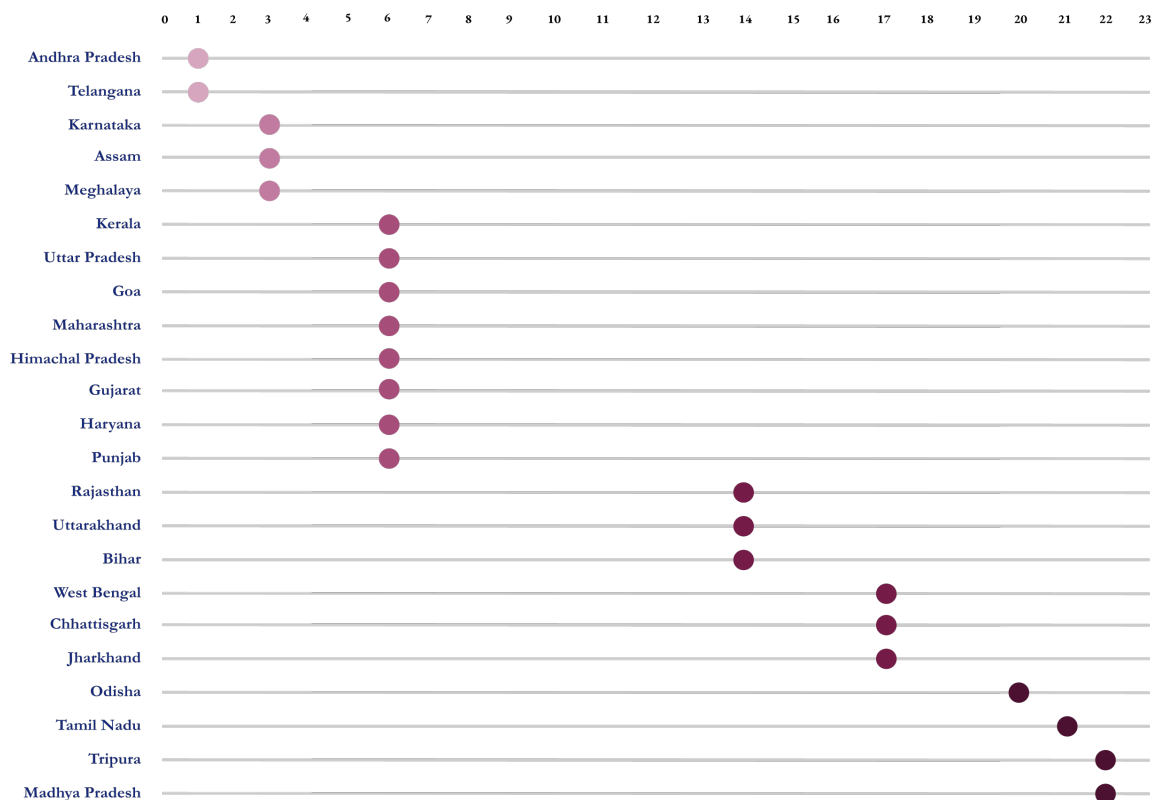
Note: Nagaland has been excluded from this indicator due to unavailability of the state's Inter-State Migrant Workmen Rules.

P2: State performance on freedom to work in jobs deemed hazardous

Following the Industrial Revolution, many economies banned women from certain jobs to protect them from unsafe working conditions (World Bank 2016). Bombay Factory Commission (1884) and Factory Labour Commission (1890) found that women and children in Indian mills were inadequately protected as compared to English mills (Kulkarni 1949). Notions such as women working with moving machinery were at greater risk and more prone to accidents, led to legal prohibitions on the employment of women across processes that state governments considered dangerous or hazardous. The Factories Act prohibits the employment of women to clean, lubricate, or adjust any part of a machinery, to work near cotton openers, and to work in operations deemed hazardous by the government. Even as safer machines were later introduced, remnants of the bias against women working with machines are evident across laws (Sen et al. 1999).

Many Indian states continue to restrict women from working in dangerous jobs across factories, commercial establishments, and plantations. Andhra Pradesh and Telangana are the only two states that allow women to work in all hazardous factory processes. Madhya Pradesh is the most restrictive; it is the only state that prohibits women from working in dangerous processes in both factories and commercial establishments.

Figure 2.7: State rankings on P2: Working in jobs deemed hazardous



Note: Five state (Arunachal Pradesh, Manipur, Mizoram, Nagaland, and Sikkim) have been excluded from this parameter. due to non-availability of data across indicators

P2.I1: Can women work in jobs deemed hazardous in factories?

22 states prohibit the employment of women in up to 80 different processes deemed dangerous.⁴ Bihar and Jharkhand are the worst offenders, prohibiting women from 49 processes, followed by West Bengal, Assam, Punjab, Rajasthan, Goa, and Haryana. States like Assam, Bihar, and Gujarat prohibit women from cleaning, lubricating, or adjusting any part of machinery in a factory while that part is in motion. 18 states, including Maharashtra, Tamil Nadu, and Rajasthan, prohibit women from working in or entering buildings where the ‘generation of gas from dangerous petroleum’ takes place.

Andhra Pradesh and Telangana are the only two states to allow complete freedom for women to work in dangerous processes.

Figure 2.8: State scores on P2.I1: Can women work in jobs deemed hazardous in factories?



Note: Andhra Pradesh, Manipur, Sikkim, and Nagaland are excluded from this indicator due to unavailability of their Factories Rules.

Some prohibited processes are unique to certain states. For instance, no state except Bihar prohibits the employment of women in pottery manufacturing, and no state except Madhya Pradesh prohibits employing women to work on machines used for cutting stones or making grooves on the stones in the manufacture of slate pencils. Similarly, brassware manufacturing is prohibited for women only in Uttar Pradesh, and work on jute hemp and fibre softening machines is prohibited for women only in West Bengal.

4. States are empowered to draft rules prohibiting the employment of women in dangerous operations under Section 87 of the Factories Act. Dangerous operations are those manufacturing processes that, in the opinion of the state government, would expose employees to serious bodily injury, poisoning or disease.

P2.I2: Can women work in jobs deemed hazardous in shops and commercial establishments?

Most states (24 out of 26) grant commercial establishments complete freedom to employ women in jobs deemed hazardous. Only in Madhya Pradesh and Sikkim are commercial establishments prohibited from employing women in jobs notified as dangerous.

Figure 2.9: State scores on P2.I2: Can women work in jobs deemed hazardous in shops and commercial establishments?



Note: Arunachal Pradesh and Mizoram are excluded from this indicator due to unavailability of their Shops and Establishments Act.

P2.I3: Can women work in jobs deemed hazardous in plantations?

Tamil Nadu and Tripura have used rule-making powers granted by the Plantations Labour Act, 1951 to prohibit the employment of women handling hazardous chemicals. Tamil Nadu prohibits the employment of women for handling, storing, and transportation of insecticides, chemical and toxic substances. In addition to these processes, Tripura also prohibits women from spraying insecticides, and chemical and toxic substances in tea gardens. Hence, Tamil Nadu and Tripura have been scored 0/100 (i.e. complete prohibition)

States are empowered under Section 18A(2) of the Plantations Labour Act to prohibit or restrict the employment of women or adolescents in jobs that use or handle hazardous chemicals. The Plantations Labour Rules for most states were unavailable. The publicly available rules of five states (Assam, Karnataka, Meghalaya, Tamil Nadu, and Tripura) have been used to draft the findings of this report. Assam, Karnataka, Meghalaya and the states we did not find the plantation labour rules for have been scored as 100/100 (i.e. complete freedom). As and when the data becomes available, the index and scores will be updated.

P3: State performance on freedom to work in jobs deemed arduous

Across the world, jobs that involve manual labour are commonly considered as exceeding women's capabilities, and are often ringfenced based on sex. Russia prescribes 'allowable loads for women when lifting or moving heavy objects manually'. Similarly, Ukraine's labour code mandates that women should not be employed to 'lift or move objects whose weight exceeds the maximum norms established for them'. According to the Women, Business, and the Law Report (2016), 46 countries out of 173 prohibited women from engaging in heavy-lifting jobs.

Figure 2.10: State rankings on P3: Working in jobs deemed arduous



Note: Five states (Arunachal Pradesh, Manipur, Mizoram, Nagaland, and Sikkim) have been excluded from this parameter due to non-availability of data across indicators.

Indian states also prohibit women from working in jobs deemed arduous under the Factories Act and attached state Rules.⁵ Bihar and Jharkhand grant the most freedom to women to work in jobs deemed arduous by allowing women to be employed subject to the state government's permission.

5. Section 34 of the Factories Act, 1948 empowers states to prescribe the maximum weight load that women can carry or lift.

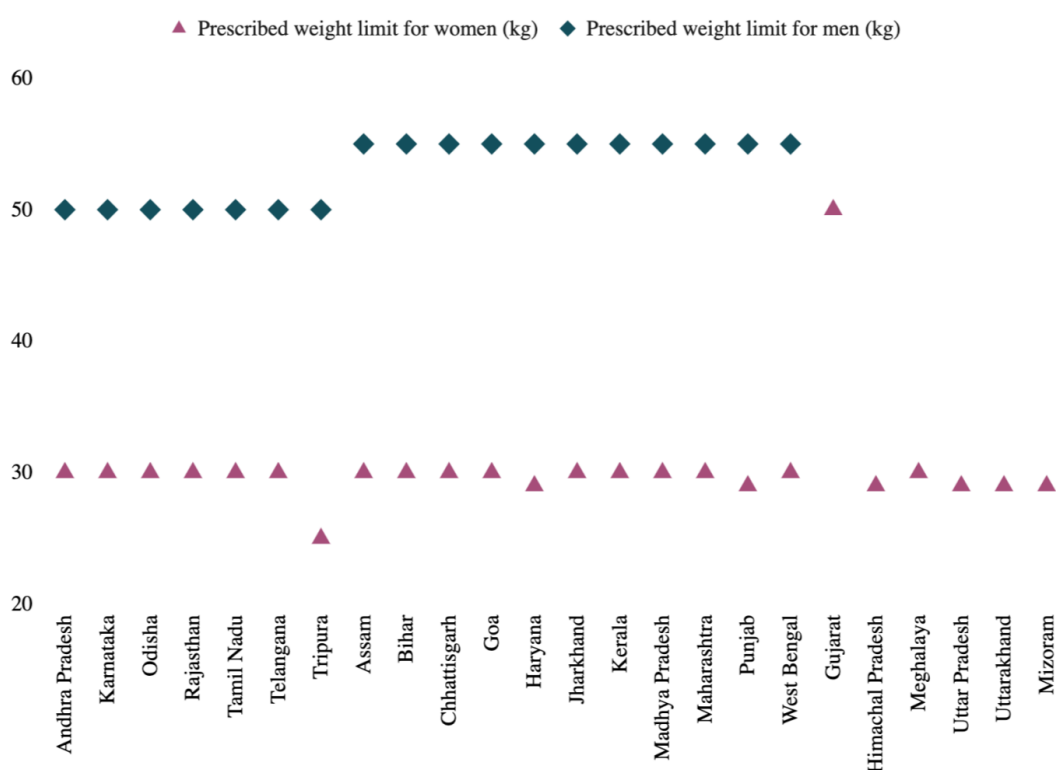
P3: I1: Can women engage in tasks that require lifting heavy objects in the same way as men?

22 states completely prohibit women from engaging in tasks that require lifting heavy objects in the same way as men. The prescribed weight limits for women range between 25-30 kgs across all states. Hence, these 22 states earn a score of 0/100 (i.e. prohibit all).

Bihar and Jharkhand prescribe a maximum weight limit of 30 kgs for women. However, they also allow relaxation in the prescribed weight limit subject to approval by the government, which is valid for a period of three months. Further, governments in both states can withdraw this exemption at any point of time 'without assigning any reason and subject to such conditions as may be specified in the said order'. Hence these two states earn a score of 30/100 (i.e. these two states prohibit most and allow some).

Uttar Pradesh and Uttarakhand make a distinction between intermittent and continuous work, and prescribe a weight limit of 29 kgs for women in intermittent work and 19 kgs in continuous work. However, neither state defines intermittent and continuous work.

Figure 2.11: Prescribed weights for men and women across states on the index



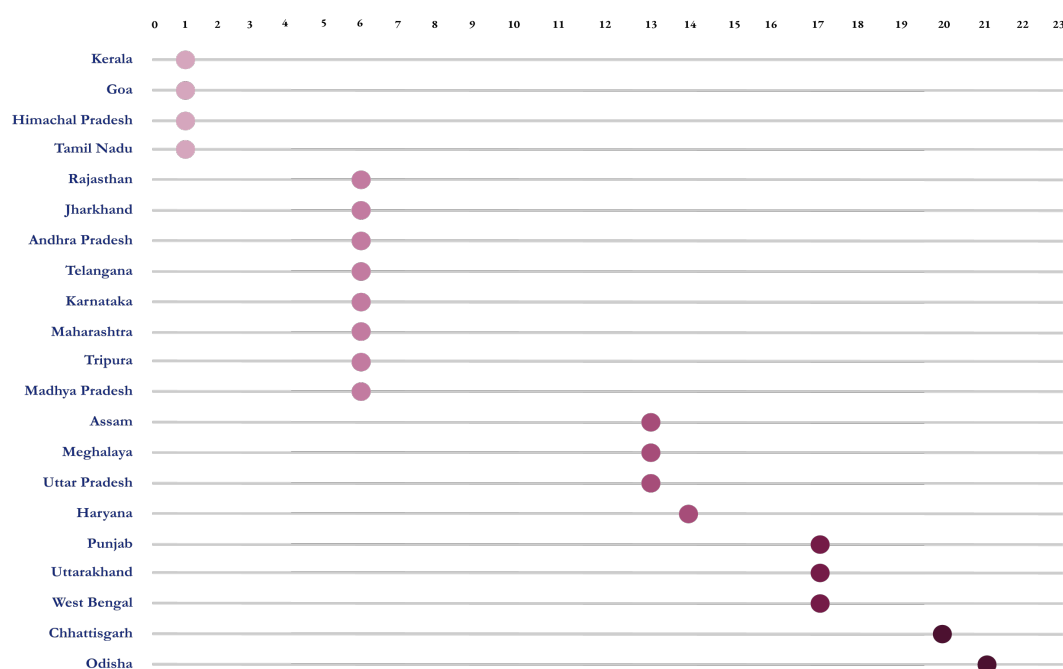
P4: State performance on freedom to work in jobs deemed morally inappropriate

Laws often prohibit the employment of women for the manufacture or sale of liquor because it runs afoul of the moral development of women (World Bank 2016). Even in different states of the USA, women could not work as bartenders unless the women were related to the owner (Culgan 2017). Chicago removed the restrictions on women bartenders in 1970 (Jacob 2020).

De (2018) argues that the Indian Constitution is very comfortable regulating customs and morals through law, including consumption of and trade in liquor.⁶ Bihar, Gujarat, Mizoram, and Nagaland still follow a policy of complete prohibition on the sale and consumption of liquor.⁷

Some Indian states use excise laws to prohibit the employment of women in licensed liquor establishments. These laws have been framed to save ‘the woman folk from becoming addict to the intoxicants and avert and avoid any conflict between sexes and chances of foreseen sexual offences’ (The Punjab Excise Act, 1914). Goa, Himachal Pradesh, Kerala, and Tamil Nadu grant the most freedom to women to be employed in licensed liquor establishments, whereas Chhattisgarh, Haryana, Odisha, Punjab, Uttarakhand, and West Bengal are the most restrictive.

Figure 2.12: State rankings on P4: Working in jobs deemed morally inappropriate



Note: Five states (Arunachal Pradesh, Manipur, Mizoram, Nagaland, and Sikkim) have been excluded from this parameter due to non-availability of data across indicators. Additionally, Bihar and Gujarat have been excluded from this parameter because they are dry states.

6. Part 4: Directive Principles of State Policy: Article 47: ... *the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.*

7. Mizoram & Nagaland are not included for the index estimation because of unavailability of data across indicators in these states. Scores of Bihar & Gujarat on P4 have not been used for calculating the rating averages of these states.

P4.I1: Can women work in licensed country liquor establishments?

Seven states—Andhra Pradesh, Goa, Himachal Pradesh, Kerala, Rajasthan, Tamil Nadu, and Telangana—place no restrictions on the employment of women for the sale of country liquor. Arunachal Pradesh, Jharkhand, Karnataka, Sikkim, and Tripura permit women to work in premises where country liquor is consumed by the public, subject to written permission from the Excise Commissioner/Board.

Figure 2.13: Infographic for showing state scores on the indicator: can women work in licensed country liquor establishments?



Note: Bihar, Gujarat, Mizoram, and Nagland have been excluded from this indicator as they are dry states.

12 states prohibit women from working as salespersons of country liquor, or in premises where the public consumes country liquor. Assam, Chhattisgarh, Maharashtra, Manipur, Meghalaya, Odisha, Uttar Pradesh, and Uttarakhand levy restrictions on women working in the sale of country liquor. Haryana, Madhya Pradesh, Punjab, and West Bengal impose restrictions on women working in premises where country liquor is served to the public. Chhattisgarh and Uttar Pradesh require a licence applicant to file an affidavit to the effect that, ‘he shall not employ any salesman or representative who has criminal background’, or any person ‘who suffers from any infectious or contagious disease or is below 21 years of age’, or ‘a woman’. In addition to restricting women’s employment in the sale of country liquor, Madhya Pradesh also restricts employment of women in the sale of ‘hemp drugs or tari’.⁸

8. The Madhya Pradesh Shops and Establishments Act, 1958 defines tari as ‘fermented or unfermented juice drawn from any kind of palm tree’.

P4.I2: Can women work in licensed foreign liquor establishments?

Arunachal Pradesh, Goa, Himachal Pradesh, Kerala, Madhya Pradesh, Maharashtra, and Tamil Nadu impose no restrictions on the employment of women in foreign liquor establishments.

Figure 2.I4: Infographic for showing state scores on the indicator: can women work in licensed foreign liquor establishments?



Note: Bihar, Gujarat, Mizoram, and Nagland have been excluded from this indicator as they are dry states.

Nine states—Assam, Jharkhand, Karnataka, Manipur, Meghalaya, Rajasthan, Sikkim, Tripura, and Uttar Pradesh—allow licensed foreign liquor establishments to employ women after taking written permission from the Excise Commissioner/Board. Eight states prohibit women from working in establishments selling foreign liquor. Andhra Pradesh, Telangana, and Uttarakhand levy restrictions on women working in the sale of foreign liquor, and Chhattisgarh, Haryana, Odisha, Punjab, West Bengal levy restrictions on women working in premises where foreign liquor is served to the public.

3

Contextualising Findings: Judicial approach to sex-based legal restrictions

While equality of the sexes is guaranteed as a fundamental right, in reality, discrimination against women is not always violative of the Constitution.¹ Both union and state governments have wide-ranging powers to decide what is in the interest of women. For instance, the government can put restrictions on the conditions under which women can work, or prevent women from making choices that may cause them harm. When women claim discrimination, courts decide if that discrimination is unconstitutional.

To understand how courts have dealt with legally sanctioned economic discrimination against women, the researchers analysed 26 court judgments concerning sex-based discrimination.²

Of these, 23 cases contested restrictions on working at night, on working in certain jobs, and in public employment. In 18 cases, the courts fully or partially invalidated the regulation. In five cases,

1. The right to equality is enshrined as a fundamental right under Articles 14 and 15 of the Constitution.

2. **Supreme Court:** *Bombay Labour Union Representing the Workmen of International Franchises Pvt. Ltd. v. International Franchises Pvt. Ltd.* (AIR 1966 SC 942); *Air India v. Nergesh Meerza* (1981 AIR 1829); *Secretary, Ministry of Defence v. Babita Puniya* ((2020) 7 SCC 469); *Lt. Col. Nitisha v. Union of India* (AIR 2021 SC 1797); *Air India Cabin Crew Association v. Yeshawinee Merchant* (AIR 2004 SC 187); *Indian Hotel and Restaurants Association v. State of Maharashtra* (AIR 2019 SC 589); *Mackinnon Mackenzie and Co. v. Audrey D'Acosta* (AIR 1987 SC 1281); *Government of Andhra Pradesh v. P.B. Vijaykumar* (AIR 1995 SC 1648); *C.B. Muthamma v. Union of India* (AIR 1979 SC 1868); *Anuj Garg v. Hotel Association of India* (AIR 2008 SC 663) **Kerala High Court:** *Leela v. State of Kerala* (2004 (102) FLR 207); *A.N. Rajamma v. State of Kerala* (ILR 1983(2) Kerala 271); *A.M. Shaila v. Chairman, Cochin Port Trust* ((1995) ILLJ 1193 Ker); *Treasa Josfine v. State of Kerala* (2021 (171) FLR 372); *Vijayamma v. State of Kerala* ((1978) IILLJ 323 Ker); *Dhanyamol v. State of Kerala* (2016 (5) SLR 237) **Delhi High Court:** *Rajendra Grover v. Union of India* ((2008) ILR 1 Delhi 508); *Hotel Association of India v. Union of India* (2006 (86) DRJ 668); *Walter Alfred Baid v. Union of India* (AIR 1976 Delhi 302) **Madras High Court:** *Vasantha R. v. Union of India* ((2001) IILLJ 843 Mad); **Andhra Pradesh High Court:** *Triveni K.S. v. Union of India* (2002 (5) ALT 223); **Punjab and Haryana High Court:** *Raghubans Saudagar Singh v. State of Punjab* (AIR 1972 PH 117); **Calcutta High Court:** *Purnima Nandi v. State of West Bengal*; **Karnataka High Court:** *Shailesh S Naik v. State of Karnataka*; **Bombay High Court:** *Barkur Sudhakar Shetty v. Special Inspector of Police*; **Orissa High Court:** *Radha Charan Patnaik v. State of Orissa* (AIR 1969 Ori 237).

the courts upheld the provision. 10 judgments were delivered by the Supreme Court and 16 by High Courts. Of the Supreme Court judgments, 7 related to restrictions on women's employment. One of these cases was heard by a three-judge bench and the rest by benches of 2 judges.

11 of these judgments concern legally sanctioned discrimination against female jobseekers. Petitioners contested the constitutionality of restrictions on women from working at night (example, Section 66(1)(b) of Factories Act, 1948), restrictions on women from working in certain premises (example, Section 30 of Punjab Excise Act, 1914), and manner of implementation of such laws (example, in Bengal Excise Act, 1909). 14 judgments deal with discrimination in employment in the public sector or offer interpretive value. While these cases did not concern statute-based discrimination, they helped clarify the judicial approach to sex, employment, discrimination, and beneficial legislation.

What did petitioners contest?

Restrictions against working at night

We analysed the final judgments of five petitions against restrictions on women working at night.³ Four out of five petitioners challenged the constitutionality of Section 66(1)(b) of the Factories Act, which prohibits women from being 'required or allowed' to work at night. The fifth case challenged a similar restriction emerging from the stated policy of Cochin Port Trust.⁴

The petitioners in *Vasanth R. v. Union of India* argued that the restriction violated their fundamental rights to livelihood and equality. These restrictions infringed upon their right to decide the circumstances under which they worked, and the selective application of such a provision to women was discriminatory. The restriction caused women to be excluded from workplaces or prevented them from advancing.

The Tamil Nadu and Kerala state governments argued that these restrictions were protective in nature. Working at night exposed women to dangers 'of various kinds' or to the 'physical dangers' of working long hours, hindered their ability to perform their domestic and social responsibilities, and would increase women's vulnerability to the 'moral dangers' of sexual violence. The government was morally bound to institute 'protective restrictions' in public interest. In fact, these restrictions were in keeping with international commitments.⁵

In three cases, the courts rejected the argument that Section 66 of the Factories Act was protective

3. *Triveni K.S. v. Union of India*, *Vasanth R. v. Union of India*, *Leela v. State of Kerala*, *Tresa Josfine v. State of Kerala*, *A.M. Shaila v. Chairman, Cochin Port Trust*.

4. Women were denied the opportunity to apply for the job of shed clerks because the job involved hazardous work. Since shed clerks had to work at night, the Port Trust had decided that the job was too hazardous for women.

5. *Vasanth R. v. Union of India*, Para 19-26, and *A.M. Shaila v. Chairman, Cochin Port Trust*, Para 14.

and declared it violative of the right to livelihood and equality. Madras High Court observed that other provisions of the Act already regulated working hours in the interest of occupational safety. Andhra Pradesh High Court recognised that the restrictions cost women economic opportunities. Kerala High Court relied on the Act's objectives to conclude that the provision could not deny willing women the opportunity to work.⁶

In two cases, Kerala High Court accepted the arguments made by the government respondents. The court held that women were particularly vulnerable to certain hazards of the job including 'risks peculiar to their sex', which justified discrimination. The court also argued that the restrictions were reasonable since they did not completely restrict the employment of women.⁷

Restrictions against working as servers/performers

Some laws prevent women from working in premises where liquor is served. We analysed the final judgments in three petitions related to these laws.⁸

Petitioners argued that restrictions limited economic opportunities and could not be justified as regulation of trade in liquor; women should be allowed to participate in the trade on an equal footing with men. The Government of India and the state government of Delhi separately argued for their right to regulate all matters related to the liquor trade. Women were particularly vulnerable as victims of intoxication-led violence, and restrictions helped preserve public health and morality. The Government of Kerala also argued that the restrictions were imposed in response to complaints that women were serving liquor.⁹

The courts in all three cases rejected the argument of the government respondents. The Supreme Court stressed that all restrictions on people's rights require the government to strike a balance between personal freedom and security. Complete restrictions on women's right to work in premises serving alcohol was a 'severe impediment' to their professional advancement. Such sex-based restrictions were premised on social attitudes about women, and restricting women's opportunity on security and public order grounds instead of ensuring their safety at work was unjustifiably violative of their personal autonomy.¹⁰

6. Vasantha R. v. Union of India, Para 50, Triveni K.S. v. Union of India, Para 5 and 10, and Treasa Josfine v. State of Kerala, Para 15.

7. Leela v. State of Kerala, Para 11 and 13, and A.M. Shaila v. Chairman, Cochin Port Trust, Para 14.

8. Hotel Association of India v Union of India, Anuj Garg v Hotel Association of India, and Dhanyamol v. State of Kerala. Of the three cases, two arise out of the same dispute. Anuj Garg was a result of some members of the public contesting the decision of the Delhi High Court in Hotel Association of India.

9. Hotel Association of India v. Union of India, Para 2, 4, and 7, and Dhanyamol v. State of Kerala, Para 1, 3, and 10.

10. Hotel Association of India v. Union of India, Para 12 and 20, Anuj Garg v. Hotel Association of India, Para 34 and 36, and Dhanyamol v. State of Kerala, Para 33.

Some laws also regulate how women work as performers. We analysed the final judgment of one petition against a law in Maharashtra that restricted dance bars.¹¹

The law under challenge made it punishable for any establishment owner to allow obscene dance, and mandated restrictions on hosting dance performances. A hoteliers association petitioned that this law violated their right to livelihood. The Indian Penal Code and the Police Act already regulated obscenity and places of public amusement. Punishing performances as obscene violated the dancers' fundamental right to expression. Besides, several restrictions were arbitrary and based on specious justification. In court, the Government of Maharashtra justified the law as necessary to maintain public order and protect women from exploitation.¹²

The Supreme Court did not fully endorse either view. The court agreed that the government had the right to regulate obscene dances. However, the court also accepted the petitioners' argument that some provisions of the law were so restrictive, they amounted to a complete prohibition. The court selectively modified regulations to bring the law within constitutional limits. The regulations on where such an establishment could be located were held to be unreasonable given the spatial constraints of a city. The regulations limiting the time of the day for such performances were held reasonable. Prohibition on showering coins on the dancers was held reasonable, but the requirement that tips be given to the establishment owner was held unreasonable.¹³

We also analysed three judgments on the implementation of such laws.¹⁴

In Maharashtra, a hotel owner petitioned that despite complying with licensing requirements, he faced regular harassment by law enforcement because his establishment hired women as servers and performers. In West Bengal, some 'lady crooners' petitioned that police authorities asked for a performer's licence even though there was no such requirement under the law.¹⁵

The Government of West Bengal argued that the restrictions were put in place for 'maintenance of law and order and prevention of crime'. The Government of Maharashtra argued that the presence of women at such premises increased the probability of the occurrence of 'immoral', 'lewd', or otherwise 'indecent' behaviour. Therefore, the government could take intrusive measures to 'prevent serious disorder or breach of law'.¹⁶

The courts in these two cases took opposite approaches to resolving the disputes. Bombay High

11. Indian Hotel and Restaurant Association v. State of Maharashtra. Petitioners challenged the Maharashtra Prohibition of Obscene Dance in Hotels, Restaurant and Bar Rooms and Protection of Dignity of Women (Working therein) Act, 2016.

12. Indian Hotel and Restaurant Association v. State of Maharashtra, Para 19, 29, 31, 46, and 59.

13. Indian Hotel and Restaurant Association v. State of Maharashtra, Para 74, 93, 98, and 100.

14. Barkur Sudhakar Shetty v. Special Inspector of Police, Purnima Nandi v. State of West Bengal, and Shailesh S Naik v. State of Karnataka. The dispute in the case of Shailesh S Naik v. State of Karnataka did not centre on restrictions on women's employment. The government issued G.O. No. HD 357 SSD 2010 to regulate the employment of women invoking their power to 'preserve order in public places'. The establishments challenged the government's procedural fidelity in initiating criminal proceedings under the G.O.

15. Barkur Sudhakar Shetty v. Special Inspector of Police, Para 3, Purnima Nandi v. State of West Bengal, Para 1-2.

16. Purnima Nandi v. State of West Bengal, Para 3 and Barkur Sudhakar Shetty v. Special Inspector of Police, Para 7.

Court held that the establishments' right to livelihood had been violated, and that the government should have used less intrusive alternatives in dealing with enterprises that employ women. The court further argued that the government 'ought to be condemned' for assuming that women serving liquor would likely be involved in lewd and indecent activities. Calcutta High Court concluded that even though performer-specific licences were not mandated under the law, the police could ask the enterprise to disclose all details of their performers. The court went a step further to ask that these disclosure requirements be read into the licence.¹⁷

Restrictions against full opportunity in public employment

Women's ability to work in the public sector is often limited by entry qualifications and employment conditions. We analysed 11 cases where such restrictions were challenged.¹⁸

Working with the opposite sex

In three cases, petitioners challenged legal provisions under which the government restricted opportunities on the grounds that these jobs were inappropriate given the sex of the employee.¹⁹ The government respondents argued that the petitioner would have to interact with people of the opposite sex on the job; either the employee or the persons with whom they interact would be unsafe. In one case, a woman was prohibited from working as a superintendent in a jail housing male criminals. In the second, a woman was denied a promotion so she would not have to spend 'odd hours' with male officers. In the third, a man was prohibited from working as the administrator of a nursing school with predominantly female students.²⁰

Punjab and Haryana High Court supported the government's position that the right to equality in public employment was subject to the government's right to hire the best person for the job. Inherent differences between the sexes made women unsuitable for certain jobs. In the other two cases, the court rejected the government's arguments holding that women's right against discrimination was 'unqualified and absolute', and the 'practical consequence' of the government's action was the infringement of this right. Kerala High Court concluded that the restrictions were, in essence, sex-based discrimination.²¹

17. *Barkur Sudhakar Shetty v. Special Inspector of Police*, Para 13, 15, and 18, and *Purnima Nandi v. State of West Bengal*, Paras 7, 8, 9, and 12.

18. *Raghubans Saudagar Singh v. State of Punjab*, *Vijayamma v. State of Kerala*, *Walter A Baid v. Union of India*, *A.N. Rajamma v. State of Kerala*, *Radha Charan Patnaik v. State of Orissa*, *C.B. Muthamma v. Union of India*, *Air India v. Nergesh Meerza*, *Air India Cabin Crew Association v. Yeshawinee Merchant*, *Rajendra Grover v. Union of India*, *Secretary, Ministry of Defence v. Babita Puniya*, and *Lt. Col. Nitisha v. Union of India*.

19. *Raghubans Saudagar Singh v. State of Punjab*, *Vijayamma v. State of Kerala*, *Walter A Baid v. Union of India*.
20. *Raghubans Saudagar Singh v. State of Punjab*, Para 2, *Vijayamma v. State of Kerala*, Para 2, and *Walter A Baid v. Union of India*, Para 4 and 9.

21. *Raghubans Saudagar Singh v. State of Punjab*, Para 8 and 19, *Walter A Baid v. Union of India*, Para 7, and *Vijayamma v. State of Kerala*, Para 8.

Working after marriage or pregnancy

In five cases, petitioners challenged the policy of restricting opportunities for women after marriage or pregnancy.²² The petitioners in two Air India cases argued that women were being selected for hostile discrimination, despite fulfilling near identical duties.²³

Government respondents argued that the ‘circumstances prevailing in India and the effects of marriage’ justify the discrimination and the removal of restrictions would result in administrative inconvenience. Air India’s discrimination was reasonable since married women would have difficulty meeting time commitments and physical appearance requirements. The Government of Odisha argued as the restriction was based on marriage and not sex, it was constitutional.²⁴

In two cases the restrictions were declared unconstitutional. Orissa High Court argued that the restrictions concerning marriage were in substance sex-based discrimination since marriage acted as a bar only to the employment of women. The Supreme Court held that the restriction was unjustifiable since men and women are likely to be affected equally by marital responsibilities. Further, the Court also stated that equality must always prevail between the sexes unless ‘differentiation is demonstrable’ in the form of ‘requirements of particular employment, the sensitivities of sex, peculiarities of societal sectors or the handicaps of either sex’.

In the Air India cases, the Supreme Court declared the restriction on marriage constitutional, but that on pregnancy unconstitutional.²⁵ On marriage, the court posited that male and female employees were governed by different conditions of service and that female employees had consented to terms of employment. Further, the restrictions helped women enjoy benefits from lesser work and delayed marriage, and helped promote family planning. On pregnancy, the court held unscientific the claim that pregnant women would be unable to work. Further, as the government mandated maternity benefits, they could not claim administrative inconvenience. Finally, since restrictions on pregnancy affected the ‘very ordinary course of human nature’, they were ‘offensive to the notions of a civilised society’.²⁶

Working in the army

Female officers of the Indian Army approached courts that despite performing similar functions to their male counterparts, they suffered serious lack of opportunity. Where male officers could

22. Radha Charan Patnaik v. State of Orissa, C.B. Muthamma v. Union of India, Air India v. Nergesh Meerza, Air India, and Cabin Crew Association v. Yeshawinee Merchant.

23. In Rajendra Grover v. Union of India, i.e. the third Air India case, the government had removed the restrictions based on marriage and pregnancy, allowing women to now work at posts they weren’t eligible to before. Male employees challenged this saying that their privilege to do those jobs exclusively was unconstitutionally violated, and that the government had gone against the court’s judgments in Nergesh Meerza and Yeshawinee Merchant.

24. Air India v. Nergesh Meerza, Para 22 and 76, and Radha Charan Patnaik v. State of Orissa, Para 13.

25. The Court’s position only extended to the first two pregnancies. The Court held that the government could put restrictions on women upon the third pregnancy in the interest of family planning and employee health.

26. Air India Cabin Crew Association v. Yeshawinee Merchant, Para 39, and Air India v. Nergesh Meerza, Para 82 and 84.

serve until the typical age of retirement, women officers could not beyond 14 years in service. Further, the administrative difficulties in accommodating female officers should not be cause for discrimination.²⁷

The union government responded that women were not allowed to perform certain roles because of ‘inherent risks’ and that women officers would find it difficult to perform, given their physiological limitations and social responsibilities. Further, allowing women the full gamut of opportunities in the army would be administratively difficult and create issues of organisational discipline.

The Supreme Court on appeal ruled in favour of the female officers. The court held that the government’s position was based on assumptions about socially ascribed roles of sex. A restriction based on presumptions of women’s physiological and social burdens is untenable since ‘it ignores the solemn constitutional values which every institution in the nation is bound to uphold and facilitate’. The court directed the army to allow women to serve at par with male officers in divisions where they were eligible to work.

After these restrictions were removed, the army began inducting women into the permanent commission. This time, female officers approached the Supreme Court, arguing that the induction process measured ability on metrics where women scored poorly owing to long-term discrimination. The Supreme Court again sided with the female officers, holding that it was bound to declare discriminatory all regulations that ‘disproportionately affected one group in a way that “perpetuated, exacerbated, or reinforced disadvantage”’.²⁸

What was the result of these contestations?

The court's reasoning in 16 cases where state-sanctioned discrimination against women was fully or partially invalidated

That the discrimination presupposed stereotypes and was based solely on sex: In some cases, the court struck down sex-based restrictions by arguing that the restrictions presupposed arcane and stereotypical assumptions about women’s role in society. Bombay High Court argued that police action in Maharashtra on the basis of the belief that women serving liquor would be involved in indecent activities was ‘condemnable’. Kerala High Court argued that restrictions on women’s employment on the basis of the hazards or difficulties of the job are in substance sex-based discrimination, and that enforcing ‘fanciful’ assumptions about women’s capabilities by law results in discrimination. The Supreme Court and Delhi High Court described such stereotypes as ‘outmoded in content and stifling in means’, and argued that the suitability for a job should be

27. Secretary, Ministry of Defence v. Babita Puniya.

28. Lt. Col. Nitisha v. Union of India, Para 65.

examined at an individual level.²⁹

That the government could not adequately justify the selective restriction: In some cases, the court struck down sex-based restrictions by arguing that the government's stated objective lacked substance. The Supreme Court and Orissa High Court struck down restrictions on women's ability to work after marriage, arguing that the government did not provide satisfactory reasons for why a similar restriction was not applicable to men. Andhra Pradesh High Court struck down restrictions under Section 66 of the Factories Act because the government could not justify why certain industries were exempt from a restriction meant to protect women. Madras High Court refused to interpret the same restrictions as a health and safety measure because other provisions of the law already regulated the working hours of all workers for this purpose. Kerala High Court argued that the same restriction could not be justified as protection unless interpreted only as prohibition on the employment of women at night against their will.³⁰

That the provision failed to strike a balance between personal freedom and protection: In some cases, the courts invalidated restrictions on women's work by arguing that such restrictions failed to balance the motivations of the government behind protective legislation with the right of personal autonomy. Kerala High Court argued that the constitutionality of a law ought to be determined not by the 'laudability of its objective' but judged by the 'method of its operation and its effect on the fundamental rights of a citizen'. While the law may have served to protect women when it was first enacted, it had now become obsolete. Delhi High Court argued that restrictions on women's ability to work in certain premises was a 'severe impediment' to their employment. The Supreme Court argued that regulation of women's employment in the name of security should not be so restrictive that their autonomy is completely lost. In another case, the Supreme Court also argued that the government's action should not have the effect of 'reinforcing, perpetuating or exacerbating disadvantage'.³¹

The court's reasoning in seven cases where state-sanctioned discrimination was upheld

That special circumstances of women justified discrimination: In some cases, courts upheld the restrictions on women's employment on the basis that the physical and social characteristics of men and women are inherently different. Punjab and Haryana High Court argued that the government could restrict a woman from being a Jail Superintendent on the basis of 'peculiarities

29. Vijayamma v. State of Kerala, Para 8, A.N. Rajamma v. State of Kerala, Para 34, Anuj Garg v Hotel Association of India, Para 39, 44-45, Walter A Baid v. Union of India, Para 10, and Secretary, Ministry of Defence v. Babita Puniya, Para 67.

30. C.B. Muthamma v. Union of India, Para 3, Radha Charan Patnaik v. State of Orissa, Para 14, Triveni K.S. v. Union of India, Para 10, Vasantha R. v. Union of India, Para 50, and Treasa Josfine v. State of Kerala, Para 15.

31. Dhanyamol v. State of Kerala. Para 27, Hotel Association of India v. Union of India, Para 12, Rajendra Grover v. Union of India, Para 33,10, Anuj Garg v. Hotel Association of India, Para 34, and Lt. Col. Nitisha v. Union of India, Para 65.

of (her) sex coupled with the other consideration' of efficiency. Kerala High Court argued that the government could restrict women's ability to work at night or in hazardous situations to protect their 'health and well being'.³² Calcutta High Court argued that police authorities had the power to impose requirements on women performers that were not explicitly recognised in law in the interest of law and order.

In the Maharashtra dance bars case, despite recognising that the government could not impose its views of morality on society, the Supreme Court upheld the prohibition on showering money on women in the interest of decency. The Supreme Court also upheld the restriction on the time of day when such establishments could run, arguing that the restriction did not adversely impact establishments.³³

That the provisions did not cause detriment to women: In one case, Kerala High Court argued that the restriction on working at night was justifiable because it did not detrimentally affect women and that women were still working in the daytime. The courts have on occasion also argued that restrictions were constitutional since they benefited women. In one of the Air India cases, the Supreme Court argued that the *to be terminated if married within 4 years of joining* regulation delayed the age of marriage and that older women would be better prepared to fulfill marital commitments. If anything, these would be beneficial for women and population control.³⁴

That the alleged discrimination was a result of bilateral settlements: In one instance, Kerala High Court held that women could not assail restrictions on working at night that they had voluntarily accepted after negotiations with their employer. The Supreme Court has made similar arguments with respect to discriminatory conditions of employment in Air India.³⁵

Overarching issues that emerge

Women are entitled to be treated equally before the law and be equally protected by laws under Article 14 of the Constitution of India.³⁶ Women are also entitled under Article 15 to not be discriminated against solely on the basis of their sex unless the discrimination benefits them.³⁷

It is the job of the courts to examine whether the government has a justifiable basis to discriminate against women. The court may take the approach of examining whether women who are discriminated against are in some real respect different from those who do not face discrimination, and if this discrimination is rationally related to some objective of the government

32. Raghubans Saudagar Singh v. State of Punjab, Para 13, and A.M. Shaila v. Chairman, Cochin Port Trust, Para 14.

33. Purnima Nandi v. State of West Bengal, Para 7, and Indian Hotels and Restaurants Association v. State of Maharashtra, Para 77, 93, and 100.

34. Leela v. State of Kerala, Para 13, and Air India v. Nergesh Meerza, Para 82.

35. Leela v. State of Kerala, Para 27, and Air India Cabin Crew Association v. Yeshawinee Merchant, Para 39.

36. Equal treatment before the law implies an absence of legal privileges, while equal protection of the laws implies that women situated similarly to other men or women must be treated similarly by the government.

37. Article 15(1): 'The State shall not discriminate on grounds only of religion, race, caste, sex, place of birth ...'.

(Jain 2014).³⁸ Alternatively, the court may examine if a law affecting women is rational, without caprice and has an ‘adequate determining principle’ (Khaitan 2016).³⁹ Finally, the court may examine if the government has some bases other than sex to justify discriminating against women, or if the law under challenge in some way benefits women.⁴⁰

When it comes to women, there is confusion on the constitutional limits of the role of the state as *parens patriae*. While examining the bases for discrimination, courts have at times allowed the government to discriminate against women in the interest of morality, security, and public order. In other cases, courts have considered restrictions on the same justifications to be discriminatory on the basis of sex ‘in substance’. Bhatia (2017) argues that the former approach is based on a ‘formal reading’ of the right against discrimination in the Constitution, while the latter is based on a ‘transformative reading’.

Some courts have scrutinised the merits of the ‘protective’ restriction argument against the standard that restrictions should have a compelling objective and proportional means.

In Anuj Garg v. Hotel Association of India, the Supreme Court held that any intrusion into women’s autonomy in economic opportunities had to be proportional to the aim pursued. Besides, whether the restriction was proportional could only be judged against a standard ‘capable of being called reasonable in a modern democratic society’. In Dhanyamol v. State of Kerala, Kerala High Court recognised that the interference should fit the 21st century and that a law considered constitutional in the previous century could be held unconstitutional in the present one.

In cases of discrimination against women, the justifications given by courts for their decisions are often morally appealing but unclear in their meaning. In the C.B. Muthamma case, the Supreme Court stated, ‘we do not mean to universalise or dogmatise that men and women are equal in all occupations and all situations and do not exclude the need to pragmatise where the requirements... may compel selectivity. But save where the differentiation is demonstrable, the rule of equality must govern’. The court admitted that it ‘may’ accept discrimination against women when the government is motivated by ‘pragmatic’ concerns. But, the court does not give further guidance on how future courts would determine if ‘differentiation is demonstrable’ (Cossman and Kapur 1993). In the Vasantha R. case, Madras High Court held restrictions on women working at night unconstitutional because of ‘social change’ and women’s status as ‘equal partners’ in the running of the home. The court does not explain why it thinks the ‘social change’ is significant enough to warrant a change in the constitutionality of the restriction.

Courts also seem to have taken the initiative to develop acceptable forms of discrimination instead of striking them down, in a ‘deferential’ approach to judicial review of laws

(Khaitan 2016). In the case of State of Maharashtra v. Indian Hotel and Restaurant Association, the

38. This is referred to as the reasonable classification test.

39. This is referred to as the manifest arbitrariness test. This was originally meant to test the constitutionality of delegated legislation. However, the Courts have applied the test to laws as well.

40. Article 15(3): ‘Nothing in this article shall prevent the State from making any special provision for women and children’.

Supreme Court directed that ‘it would be appropriate’ for the government to consider alternative regulations such as restrictions concerning the clothes that dancers could wear and the number of dancers that could perform at an establishment at any given time. The Madras High Court, in *Vasanth R. v. Union of India*, postulated a number of alternative restrictions on women’s ability to work at night in the interest of women’s welfare. One such restriction prohibited women from working at night if less than two-thirds of the workforce at night comprised women.

In several judgments, courts exhibit doctrinal confusion, show lack of precedent consciousness, or misapply previous holdings (Dhavan 1978; Baxi 2014). In the *Air India* cases, the Supreme Court’s approach to marriage and pregnancy are surprisingly different with little explanation. This apart, the Supreme Court takes different views on employment restrictions after marriage in cases with nearly identical circumstances. In the *A.M. Shaila* case, despite taking note of its previous judgments in the *A.N. Rajamma* and *Vijayamma* cases, Kerala High Court upheld the restriction on women from working at night and in physically hazardous situations. As a result of such gaps, future judges confronted with difficult issues find it difficult to follow the logic of previous courts. In two cases, Kerala High Court stated that they could not find guidance to make a decision from Indian judgments.

Courts have sought to balance the tension between the role of the government to regulate in ‘public interest’ with women’s right to agency. Kapur 2016 points out that Indian courts have taken ‘three very different approaches to the question of gender difference’, namely, ‘protectionist, sameness, and compensatory’. Bhatia (2017) urges the courts to abandon the ‘separate spheres’ approach to judging anti-discrimination cases, and adopting an ‘anti-stereotyping principle’ to guide their reading of Articles 14 and 15(1). The challenge before the courts is reconciling the fact that women face different circumstances from men, with the principle that women must be able to enjoy equality of opportunity. While they may face different circumstances, their agency and economic opportunities ought not to be held hostage to these.

4

Discussion: The beneficent administrative state and women's agency

Laws treat women as exceptions

Restrictions on working women date as far back as 1844, when women were not allowed to work in the night shift in England. Society perceived women as physically weaker and more susceptible to exploitation than men, and primarily as mothers and housekeepers. These perceptions motivated legislators to frame laws out of 'concern for women's safety, moral integrity and health, and for family welfare' (International Labour Organisation 2001).

Laws often hold women's vulnerability, biological imperative, and family responsibilities above their standing as individuals. Article 15(3) of the Constitution—that empowers the State to make 'special provisions' for women and children—was framed 'in the interest of the country or of the race'. Government counsel in *Vasantha R. v. Union of India* argued that restrictions on the employment of women were in public interest for 'preserving their strength and (also) the vigor of the race'. Kerala High Court in *Leela v. State of Kerala* pointed out that the 'very nature of women's commitment to the family and the social environment require that they cannot be entrusted with all those duties which men may be asked to perform'.

Legally sanctioned restrictions seem to regard women primarily as reproductive agents and keep them ensconced in unpaid care work. Laws built around perceptions of women's position in the family have led to a devaluation of women's work and income (Roy et al. 2011). Sen et al. 1999 argues that the Factories Act 'did not take into account the danger of abruptly reducing the earnings of women (by reducing their working hours) because it was assumed that their maintenance would be subsidised by adult male earnings'. Panandikar 1933 opines that 'owing to the universality of marriage and the joint family system in India, men workers have invariably to support a large number of dependents, women workers, owing to the same joint family system,

have not to support even themselves fully’.

Laws often group adult women together with children as a vulnerable class that needs special protection. Section 27 of the Factories Act, prohibits the employment of women and children for pressing cotton in a part of the factory where a cotton opener is being used. Similarly, the Shops and Establishments Acts of states like Bihar, Jharkhand, Odisha, and Rajasthan restrict the employment of women and children during the night shift. The Excise Acts of five states (Andhra Pradesh, Chhattisgarh, Maharashtra, Odisha, Uttar Pradesh) restrict the employment of all women and any man under the age of 25 in premises where liquor is consumed by the public.

Laws used to regulate the employment of criminals and diseased, are also used to restrict the employment of women. The Chhattisgarh Excise Act, 1915 requires a person applying for a liquor licence to submit an affidavit that ‘he shall not employ any salesman or representative who has criminal background’, or any person ‘who suffers from any infectious or contagious disease or is below 21 years of age’, or ‘a woman’. Similarly, Section 8(1) of the [Employees’ Compensation Act, 1923](#) prohibits an employer to pay a lump sum as compensation directly to a woman or a person under legal disability. The Act requires the employer to make such compensation as ‘a deposit with the Commissioner’. The Commissioner can invest the deposited compensation for ‘the benefit of the woman’ in ‘such manner as the Commissioner may direct’.

The executive then tops this up with more restrictions

State governments often exceed their rule-making powers to draft discriminatory provisions. The Contract Labour Act and the Inter-state Migrant Workmen (Regulation of Employment and Condition of Services) Act, 1979 are both union laws with attached state rules. No provision in either Act explicitly empowers states to restrict the working hours of women. However, nine out of 25 states in the case of the Contract Labour Act and 25 out of 27 states in the case of the Inter-state Migrant Workmen Act restrict the working hours of women.¹

In 2013, the Kerala government, via a notification, amended its Foreign Liquor Rules, 1953 to prohibit the employment of women in premises where liquor is served. Through the notification, the government added a new rule (Rule 27A) and new licence condition (Condition 9A) that prohibited the employment of women for serving liquor in licensed premises. In *Dhanyamol C.J. v State of Kerala*, the court observed, ‘First, the Government brands something illegal, without any statutory base; and subsequently brings about justification by amending the Rules’. Neither the principal legislation (Abkari Act, 1077) nor the secondary legislation (Kerala Foreign Liquor Rules, 1953) restricted women’s working hours before the 2013 notification.

1. According to these Acts, contractors can engage contract or inter-state migrant workers after obtaining licences. State governments have been using Section 35(2)(f) of the Contract Labour Act, 1970 and Section 35(2)(d) of the Inter-state Migrant Workmen Act, 1979—that empower them to draft conditions for granting a licence—to impose working hours restrictions on the employment of women.

The state administration also often assigns itself unguided discretionary powers. Rule 44(1) of the Andhra Pradesh Excise (Grant of licence of selling by shop and conditions of licence) Rules, 2012 prohibits women from being employed in the sale of liquor without the special permission of the Commissioner of Prohibition and Excise. Additionally, Rule 44(2) requires that every person employed for the sale of liquor needs to obtain a Nowkarnama and no Nowkarnama will be granted to women.

In Maharashtra, the owner of a hotel appealed against harassment by police officials who issued ‘oral orders’ barring the employment of women in the premises. Under the Maharashtra Police Act, 1951, 72 constables were instructed to keep an eye on the petitioner’s business to ensure complete compliance ([Barkur Sudhakar Shetty \(m/s. Prakash Hindu Hotel\) \(Rukmini Palace\) v. Senior Inspector Of Police & Others](#)).

Between 2015 and 2021, the Government of Haryana granted 592 exemptions to 212 firms under the Shops and Establishments Act and Factories Act. Out of 212 firms, 49 firms secured multiple exemptions within the same year. For instance, in 2015, Accenture secured exemptions for eight different locations including two separate floors in the same building. 111 firms out of 212 were granted exemptions in multiple years. American Express secured exemptions for four years from 2015-2018 including three renewals for different floors in nearby locations. To grant these exemptions, the Government of Haryana would have had to scrutinise individual applications for merit, issue approvals, and periodically check if the establishments met the long list of conditions.

Finally, states selectively apply discriminatory provisions only to private establishments. 23 of the 26 states that impose restrictions on the working hours of women exempt officers of the Central government, State government, and the Reserve Bank of India from all the provisions of the Shops and Establishments Act. 14 states exempt women working in railway services from the working hour prohibition. Only private establishments are regulated under the Act.

This combination makes competing in the labour market difficult for women

Frequent changes in laws may make employing women difficult, as employers have to keep track of all types of legal changes to comply. Laws can be changed by the state government through three different legal instruments: amendments in Acts, amendments in Rules, and by issuing government orders. Additionally, laws can be pronounced (wholly or partly) unenforceable by court judgments.

Imagine a manufacturing company with factories in [five industrial states](#)— Gujarat, Karnataka, Maharashtra, Tamil Nadu, and Uttar Pradesh. Between 2015 and 2020, most of these states instituted some form of change in the provisions related to the employment of women in the

night-shift. Maharashtra (2015) and Uttar Pradesh (2017) amended the Act, Tamil Nadu (2017) and Karnataka (2019) issued government orders. In 2013, Gujarat High Court in [Mahila Utkarsh Trust v. Union of India](#) declared the prohibition on employment of women in the night-shift ultra vires. To remain compliant, the company will have to track changes across three legal instruments and court judgements in five states.

When Acts are amended, but Rules are not revised in keeping with the law, it can create confusion. Take for instance, the Uttar Pradesh Factories Act and Rules, 1950. While a 2017 [amendment](#) in the Act removed the restrictions on the employment of women in night shifts, the Uttar Pradesh Factories Rules, 1950 continue to require factories to display an abstract that reads ‘No woman shall in any circumstances be employed in any factory more than 9 hours in any day or between the hours of 7 pm and 6 am’.

Inconsistencies within an Act can similarly create room for misinterpretation. For instance, Bihar Factories Rules, 1950 require employers to display the following confusing notice, ‘No woman shall in any circumstances be employed in any factory for more than 9 hours on any day or between the hours of 7 P. M. and 6 A. M. They may, however, be allowed to work upto 10 P. M. in special circumstances’.

The Factories Act pushes women out of important areas of the factory floor. Paragraph 6 on Schedule XX of the Gujarat Factories Rules, 1963 prohibits the employment of women ‘in any work room involving exposure to benzene or substance containing benzene’. The Factories Act and Rules across states prohibit the employment of women in at least six types of rooms including rooms where toxic and inflammable substances are treated/stored, where zinc is treated, where lead is treated, where employees can be exposed to benzene, where dangerous pesticides are manufactured and stored, and where carcinogenic dye intermediates are manipulated. Paragraph 4 on Schedule IV of the Madhya Pradesh Factories Rules, 1963 prohibits the employment of women ‘at any place where such operations (operations mentioned in paragraph 3 of the schedule) are carried on’. However, the Rules do not define ‘any place’.

The Factories and Excise Acts push women out of buildings and premises. Paragraph 1 on Schedule VII of the Kerala Factories Rules, 1957 prohibits the entry and employment of women in ‘any building in which the generation of gas from dangerous petroleum is carried on’. States like Arunachal Pradesh, Haryana, Jharkhand, Karnataka, Madhya Pradesh, Punjab, Rajasthan, Sikkim, Tripura prohibited employment of women by the licensed vendor in ‘premises where liquor is consumed by the public’.

Discriminatory laws deny women opportunities to rise up the ranks. In Kerala, a binding assistant with the Kerala Books and Publications Society was denied the opportunity to be promoted as a supervisor because of a legal restriction on women’s working hours ([Leela v. State of Kerala](#)). Similarly, a female engineering graduate engaged as a graduate engineer trainee was denied the opportunity to be considered for the post of a safety officer by Kerala Minerals and Metals

Ltd. because of restrictions on women's working hours, shifts, and holidays ([Treasa Josfine v. State of Kerala](#)). Lady cadets were also placed junior to other cadets in the army after they successfully completed their training ([Ministry of Defence v. Babita Puniya](#)).

Laws prohibit women from working on, or even near, sophisticated machinery, leaving them wanting in skills and training. Section 34 of the Factories Act, 1934 prohibited the employment of women to clean, lubricate or adjust any part of a machinery, to work near cotton openers, and to work in operations deemed hazardous by the government. The Factories Act prohibits women to work near cotton openers, or to clean, lubricate, or adjust any part of a moving machinery. Madhya Pradesh prohibits women from working in machines used for cutting stones or making grooves on stones. West Bengal prohibits women from working in feeding jute, hemp or other fibre into softening machines. Sen (1999) shows that historically such restrictions made employers perceive women as unsuitable for operating machinery and dispense with women workers by mechanising their tasks. McKinsey Global Institute (2021) has estimated that up to 12 million Indian women could lose their jobs by 2030 owing to automation.

But, some states are slowly addressing the problem

Some states have amended their Act to allow women to work between 7 PM and 6 AM.

Three states—Madhya Pradesh (2015), Maharashtra (2015), and Uttar Pradesh (2017)—have eased restrictions on women's employment in the night shift by amending Section 66(1)(b) of the Factories Act. These states substituted the prohibition on the employment of women with conditions-based exemptions.

Some states exempt female contract labourers and migrant workers employed in some types of establishments. Assam, Haryana, Maharashtra, Odisha, Punjab, Tamil Nadu, and Telangana give complete freedom to women employed in creches, and as midwives/ nurses in hospitals and dispensaries. Further, Haryana, Maharashtra, Odisha, Punjab, Tamil Nadu, and Telangana grant complete freedom to female contract labour and inter-state migrant workers employed in pithead baths and canteens. Andhra Pradesh exempts female contract labour engaged in factories from restrictions on working hours if the Government approves 'the variation in working hours under Section 66 of the Factories Act, (1948)'.

States exempt women working in some types of shops and commercial establishments.

Haryana, Himachal Pradesh, and Punjab exempt 'establishments engaged in the treatment of the sick, the infirm, the destitute or the mentally unfit'. Karnataka exempts Information Technology establishments, and Meghalaya empowers the State government to grant approvals based exemptions to any establishment. The Shops and Establishment Acts of 13 states exempt women in positions of management from the prohibition on working at night.

States exempt women working in some types of factories. In six states (Goa, Gujarat, Kerala,

Meghalaya, Tamil Nadu, and Tripura), the employment of women at night is prohibited in all factories except fish-canning and fish-curing, for which the state government gives case-by-case permission or subject to some conditions. Factories Acts of two states—Uttar Pradesh and West Bengal—empower the state government to give case-by-case permission to all factories or a class of factories to employ women at night

While some freedom is better than none, we must ask if such selective exemption is necessary at all. Andhra Pradesh High Court in [Triveni K.S. v. Union of India](#) highlighted the absurdity of selective exemption questioning whether ‘women would be safe ... working in a fish-curing or fish-canning factory during night but ... not ... if they are working in a textile industry’.

5

Conclusion: The great difficulty of minding a woman's business

14 out of 24 states in India restrict women from working at night, and 22 out of 24 restrict women from working in at least 20 factory operations. These legal restrictions have been justified on the grounds that they are drafted ‘to protect women’, ‘to prevent their exploitation’, and to preserve ‘the vigor of the race’. The union government and state governments claim that legal restrictions on women’s employment have been drafted because of concerns around women’s responsibility towards the race and to ‘promote the general health of the whole body of workers’ (Kumar 1993).

Women and men may be different, but laws should not use this difference to exacerbate gender gaps. Many Indian laws remain mired in stereotypes, and governments and courts continue to use stereotypes to justify discrimination. While stereotypes are a manifestation of disadvantages faced by women, they also perpetuate these disadvantages (Cusack 2013). International human rights conventions such as Convention on the Elimination of all forms of Discrimination against Women (CEDAW) and ICCPR (International Covenant on Civil and Political Rights) require countries to address the persistence of stereotyping in gender roles.

While drafting or justifying these legal provisions, states have kept women’s constraints in mind, but rarely their aspirations. Legally sanctioned restrictions against women discourage their employment. These provisions take away women’s bargaining power, and deprive them of the opportunities to earn a livelihood and grow. In some instances, laws even push women into occupations far more harmful for them. It may be time for states to reassess the outcomes of laws that treat male and female jobseekers differently.

Many states and courts started have started reassessing discriminatory laws based on facts and logic. In 16 of the 22 cases analysed in this report, courts invalidated state-sanctioned discrimination by highlighting that laws presupposed stereotypes, failed to balance concerns for security with personal freedom, and had a detrimental effect on women’s livelihood. At least four states, namely Haryana, Himachal Pradesh, Karnataka, and Punjab, have been granting

approval-based exemptions to factories through government orders citing the court's judgment in *Vasantha R. v. Union of India*. Other states have either amended their principal legislation (Madhya Pradesh, Maharashtra, and Uttar Pradesh) or granted exemption to specific sectors like fish canning and curing factories, hospitals and dispensaries, Information Technology establishments, canteens, and creches (Gujarat, Jharkhand, and Telangana).

Many discriminatory restrictions on female jobseekers stem from labour laws, and there is an imminent opportunity to correct these. In 2020, the Parliament passed a new labour regulatory framework that removes many restrictions on the employment of women at the union level. However, the new codes allow states to increase or decrease restrictions on women using their rule-making powers. The inter-state comparison in the report will hopefully encourage state governments to undertake reform. Once the codes are implemented, the State of Discrimination index will be updated and the ranks of states will be recalibrated. This will show us if states are moving towards greater economic freedom for women.

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Annexure 1: Methodology

Conceptual framework

This edition of the State of Discrimination Report catalogues and measures state level restrictions that take away women's options to work during certain hours of the day or in some types of jobs. The report seeks to encourage the economic emancipation of women in India by showing the systematic nature of legal discrimination and detailing the locus of such discrimination. The report draws from the approach used in the World Bank's Women, Business, and the Law Report, particularly the Workplace and Pay indicators. The indicators in the Bank's Report demonstrated statistically significant relationships with markers such as the labour force participation ratio of the sexes and wage ratio of the sexes (World Bank 2021a).

For the report, the researchers create a catalogue of laws that hamper women's right to choose work across Indian states. They apply an analytical framework (comprising four parameters broken into 11 indicators) to show the extent to which Indian states discriminate against women. States are scored on each indicator, and a composite index is built based on these indicators.

Data collection

The report catalogues discriminatory legal provisions from 152 Acts and Rules across 28 Indian states. These include the Factories Act, 1948, state Shops and Establishments Acts, the Inter-state Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979, the Contract Labour (Regulation and Abolition) Act, 1970, the Plantations Labour Act, 1951, state Excise Acts, and state rules attached to each of these.

The report covers subjects in the State list (like intoxicating liquors) and Concurrent list (like labour) of the Seventh Schedule of the Constitution of India. Subjects on the Union list are not included for measuring state-level economic discrimination as there is no inter-state variation on these subjects.

The catalogue was built using the websites of state government departments, repositories such as Manupatra and Bare Acts Live, and an internet search. The sources were mined in August 2021 and the data was coded in September 2021 and October 2021. To the best of our knowledge, the cited sources are reliable and up to date.

Datasets

Data sources for all legal provisions documented in the catalogue are available in **Dataset 1: Raw Data**. Researchers then summarised key provisions from the Acts and Rules to parse whether women could work at night and in jobs deemed hazardous, arduous, or morally inappropriate. This information is available in **Dataset 2: Processed Data**. The researchers' interpretation of raw data was validated by Ganesan and Manuraj Legal LLP, and has been made available as **Dataset 3: Validated Data**. After validation, the researchers created a fresh corrected dataset for coding. **Dataset 4: Re-processed Data** contains the validated legal provisions, their summary, and standardised codes for each indicator. Dataset 4 also includes a master coding sheet with the codes for every state on all 11 indicators. Finally, using the codes in Dataset 4, researchers assigned a score to each state on every indicator in **Dataset 5: Index and Scored Data**. Researchers also studied and summarised the judgments in 26 court cases, made available as **Dataset 6: Case Catalogue**.

Data analysis techniques

The report analysed the collected data through document analysis—coding of original/naturalistic data with minimum interference by researchers (Heaton 2004). Document analysis is an iterative process of content analysis and thematic analysis. Content analysis involves organising information into categories related to the central questions of the research (Bowen 2009). To undertake content analysis, the researcher first thinks about what she wants to find from the content, and then frames questions. Thematic analysis is based on grounded theory, a methodology that develops theory from data (Chun Tie, Birks, and Francis 2019). While content analysis uses a conceptual framework to collect data, thematic analysis uses data to construct the framework.

Many studies make use of content and thematic analysis to analyse the content of legal documents. Kort (1957) used content analysis to develop a framework to assess judicial opinions on the constitutional rights to legal counsel in criminal cases. Adams and Deakin 2017 used content analysis to parse differences in the strength of protective labour law regulation in 117 countries. Specifically, they use leximetric analysis—translating legal materials into a form useful for statistical analysis—for cross-country comparison. Outhwaite and Turner 2007 used thematic analysis (grounded theory) and content analysis methods to analyse the national biosecurity laws in Belize. Schneider 2021 used thematic analysis (social constructivist grounded theory) to determine how school principals develop the knowledge and skills to address legal issues in schools in America.

For this report, the researchers reviewed literature and applied content analysis to laws to develop an analytical rubric. They applied this rubric to compare states in a simplified and quantitative form. In order to capture nuance, recurring patterns, and lessons from studying laws, the researchers also present a thematic analysis of the data in the findings and discussion chapters of the report.

Data assessment rubric

In the Report, the researchers identify four typical restrictions on women jobseekers that limit their ability to choose work: (1) working at night; (2) working in jobs deemed hazardous; (3) working in jobs deemed arduous; and (4) working in jobs deemed morally inappropriate.

The four parameters are further broken down into 11 indicators:

Possible responses to the question ‘Can women work in factories at night?’

4 Parameters	11 Indicators
Working at night	Can women work in factories at night? Can women work in shops and commercial establishments at night? Can women work in plantations at night? Can women contract workers work in establishments at night? Can women migrant workers work in establishments at night?
Working in jobs deemed hazardous	Can women work in jobs deemed hazardous in factories? Can women work in jobs deemed hazardous in shops and commercial establishments? Can women work in jobs deemed hazardous in plantations?
Working in jobs deemed arduous	Can women engage in tasks that require lifting heavy objects in the same way as men?
Working in jobs deemed morally inappropriate	Can women work in licensed country liquor establishments? Can women work in licensed foreign liquor establishments?

Definitions:

- Jobs deemed hazardous: jobs that are considered to have a harmful effect on or pose high risk to women’s lives or health, given women’s psychophysical qualities.
- Jobs deemed morally inappropriate: employment that is considered not in accordance with the “moral development” only of women.
- Jobs deemed arduous: jobs that involve particularly hard manual labour or jobs that are considered to exceed women’s capabilities.
- Factories: As defined by the Factories Act, 1948, those premises where 20 or more workers (10 or more workers in factories without power) are employed in any manufacturing process.
- Shops and Commercial establishments: Establishments, defined in the state Shops and Establishments Act, that are engaged in trade, businesses, professions etc.
- Plantations: Any land measuring 5 hectare or more used for growing tea, coffee, rubber, cinchona, cardamom or any other plant, in which 15 or workers are employed.
- Contract workers: Workers hired by or through a contractor in establishments employing <20 contract workers.
- Migrant workers: Workers recruited in a state by or through a contractor in establishments in another state.
- Establishments: By establishments, we refer to non-government establishments.
- Women/ Female workers: Non-pregnant and non-nursing women workers

Notes:

*only applies to non-family members

Scoring technique

For each state, the findings from the content analysis of data could be recorded in four broad ways based on the state's regulatory approach. The answer to the question, 'can women do X' could be 'no', 'yes, subject to permission', 'yes, subject to conditions', and 'yes'. The category 'no' implies complete prohibition, and the category 'yes' implies complete freedom.

Broad possible responses to the questions framed as indicators

Regulatory stance	How does the stance manifest?	Example
No	The state government prohibits all employers from employing women.	The Tamil Nadu Plantation Labour Rules, 1955 state that ' No women worker or adolescent worker shall be permitted to be engaged in handling or storage or transport of insecticides, chemicals and toxic substances'.
Yes, subject to permission	If an employer wants to employ women, it will have to individually apply to the state government for permission.	Rule 9 of the West Bengal Factories Rules, 1958 states that, 'No woman unless authorised by the State Government in this behalf shall be employed in any factory for more than 9 hours in any day or between the hours of 7 p.m. and 6 a.m.'.
Yes, subject to conditions	The state government allows all employers to employ women at night, if they comply with published conditions.	Section 23 of Andhra Pradesh Shops and Establishments Act, 1988 states that, 'No Woman employee shall be required or allowed to work in any establishment before 6-00 a.m. and after 8-30 p.m. Provided that the women employees may be required or allowed to work between 8.30 p.m. and 6.00 a.m. in any establishment in which adequate safety security measures and other safeguards as may be prescribed by the State Government are provided'.
Yes	Employers do not need to take permissions or comply with conditions to employ women.	No provision in the Himachal Pradesh Shops and Commercial Establishments Act, 1969 and Himachal Pradesh Excise Act, 2011 prohibits/ restricts the employment of women at nights/ in jobs deemed hazardous/ in jobs deemed morally inappropriate/ in jobs deemed arduous.

However, states in India rarely adopt a single regulatory stance. States often use a combination of regulatory approaches for different types of establishments. A state can use one regulatory stance for most of the establishments, and another stance for some establishments. For example, Gujarat prohibits the employment of women in most factories at night, except in the fish canning and curing industry, subject to conditions. Using document analysis, we identify 16 possible codes to capture the state's regulatory stance on an indicator.

Each possibility is evaluated such that the most restrictive provision (complete prohibition) is assigned the lowest score and the least restrictive provision (complete freedom) is assigned the highest score. The farther a possibility from complete prohibition and closer to complete freedom, the higher the score. Possibilities on the spectrum are evenly spaced (i.e., at a distance of five from each other), save for the two possibilities closest to complete prohibition and complete freedom. Given that this report prizes the economic emancipation of women, the possibility 'prohibits most, permits some' is spaced 15 away from complete prohibition, and the possibility 'allows most, exempts some' is spaced 20 away from complete freedom.

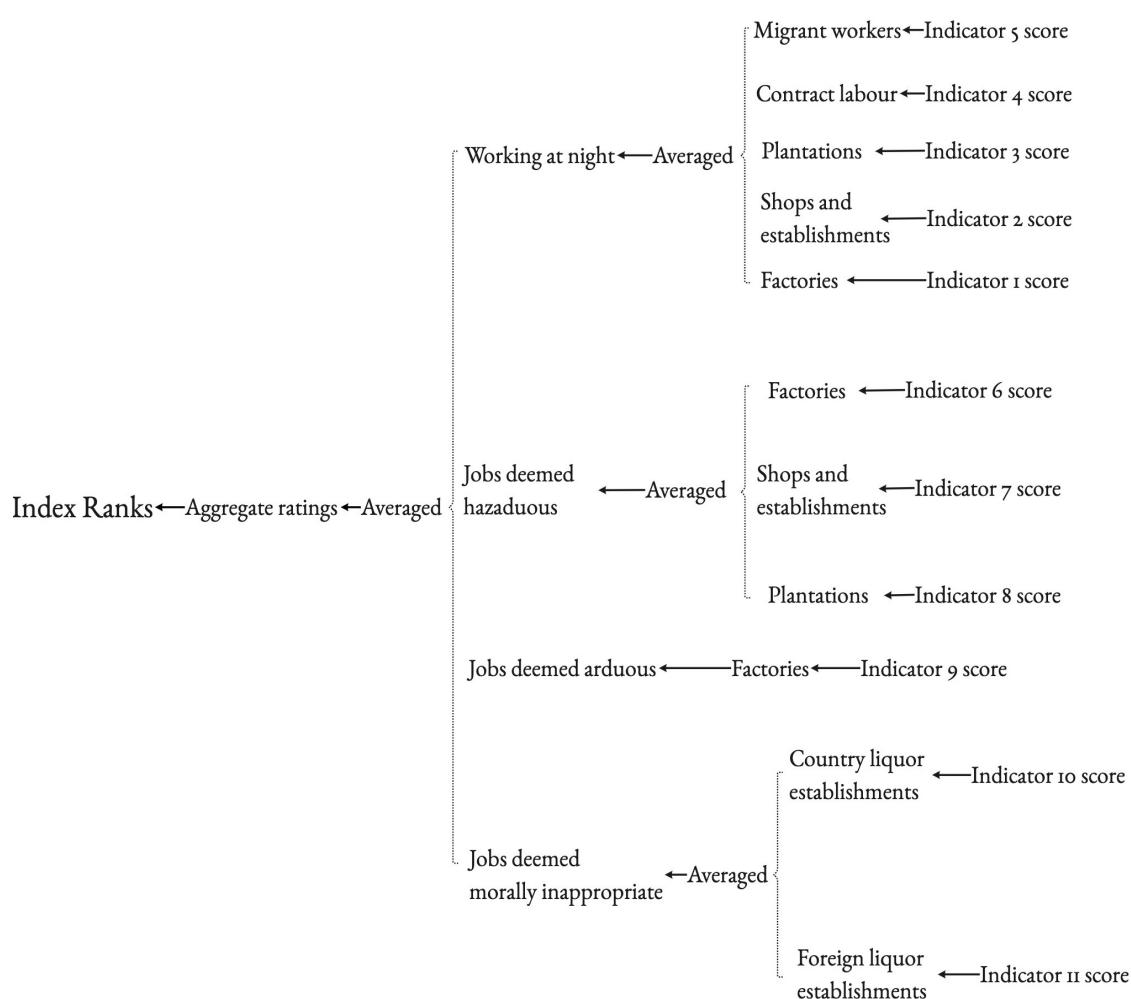
Scores for Possible Combinations

Regulatory Stance	Code	Score
Complete Prohibition	No	0
Prohibits most and Permits some	No in most & Yes subject to permission in some	15
Prohibits most and Exempts some	No in most & Yes subject to conditions in some	20
Permits most and Prohibits some	Yes subject to permission in most & No in some	25
Prohibits most and Allows some	No in most & Yes in some	30
Permits all	Yes subject to permission	35
Permits most and Exempts some	Yes subject to permission in most & Yes subject to conditions in some	40
Exempts most and Prohibits some	Yes subject to conditions in most & No in some	45
Permits most and Allows some	Yes subject to permission in most & Yes in some	50
Exempts most and Permits some	Yes subject to conditions in most & Yes subject to permission in some	55
Exempts all	Yes subject to conditions	60
Allows most and Prohibits some	Yes in most & No in some	65
Allows most and Permits some	Yes in most & Yes subject to permission in some	70
Exempts most and allows some	Yes subject to conditions in most & Yes in some	75
Allows most and Exempts some	Yes in most & Yes subject to conditions in some	80
Complete Freedom	Yes	100

Composite measures

The report scores states on all 11 indicators. All indicators are assigned equal weights. The fact that the scores are ordinal values, precludes performing mathematical operations on them. Hence, states are assigned 'ratings' based on the scores. The ratings of all indicators under one parameter are averaged to compute the parameter ratings. These parameter ratings are further averaged to yield the ultimate state rank on the index. Dataset 5: Index and Scored data shows the calculations related to indicator scores and indicator ratings, parameter ratings, and aggregate ratings and state ranks on the index.

Composite measures for State of Discrimination index



Limitations of the index and the report

Any measure of the kind proposed in this report is only an approximation of the underlying reality. This is a feature of all social science datasets, whether they rely on content analysis, surveys, fieldwork, or other modes of data collection. The attempt to provide a conceptually useful approximation notwithstanding, the following limitations of the methodology are salient:

- **The index captures the law on the books, not the law in action.** The report does not take into account the number of establishments, or the number of female employees in establishments governed by a certain legal provision in a state, nor the experience of commercial entities or government officials. This is a de jure analysis of the restrictions imposed on all establishments that could be set up in a state. An analysis like this can only elucidate the ‘manifest content’/meaning of legal texts, but cannot predict how these laws will be implemented or the impact of such implementation on different entities.
- **The rankings are constructed using an ordinal scale, and on ordinal scales the distance between measures is subjective.** Regulatory possibilities are scored based on the assumption that they are evenly better than the previous possibility. Researchers chose scores that would be easy to analyse. While the relative positions of regulatory possibilities are conceptually sound (i.e. case by case permission is worse than complete freedom), the mathematical distance between the possibilities is not based on fact or theory (i.e. case by case permission is five times worse than complete freedom).
- **The report may contain dated information on regulations.** The volume of subordinate legislation (notifications, government orders, circulars etc.) is large, and there is no single place from where to source these on any particular date. Errors could have inadvertently crept in despite best effort at data validation.
- **Indicators are weighted equally.** The composite measures contain an implicit weight for how heavily legislated a subject is (working at night) and which types of establishments are most heavily restricted (factories). These weights are accounted for because there were 5 indicators out of 11 that were based on the most heavily legislated subject, and 3 out of 11 indicators that analysed regulations for the most heavily regulated establishments. However, there could be different ways of measuring the relative importance of different parameters.
- **Arunachal Pradesh, Manipur, Sikkim, Nagaland, and Mizoram are not covered in the report because the following were unavailable:**
 - * The Factories Rules of: Arunachal Pradesh, Manipur, Sikkim, and Nagaland,
 - * The Shops and Establishments Acts/Rules of: Arunachal Pradesh and Mizoram
 - * The Contract Labour Act and Rules of: Arunachal Pradesh and Sikkim
 - * The Inter-state Migrant Workmen Rules of: Nagaland.

Annexure 2: Summary of State Performance

State	P1: Working at Night					P2: Working in jobs deemed hazardous			P3: Working in jobs deemed arduous	P4: Working in jobs deemed morally inappropriate	
	P1.I1: Can women work in factories at night?	P1.I2: Can women work in shops and establishments at night?	P1.I3: Can women work in plantations at night?	P1.I4: Can women contract workers work in establishments at night?	P1.I5: Can women migrant workers work in establishments at night?	P2.I1: Can women work in jobs deemed hazardous in factories?	P2.I2: Can women work in jobs deemed hazardous in shops and commercial establishments?	P2.I3: Can women work in jobs deemed hazardous in plantations?	P3.I1: Can women engaged in tasks that require lifting heavy objects in the same way as men?	P4.I1: Can women work in licensed country liquor establishments?	P4.I2: Can women work in licensed foreign liquor establishments?
Andhra Pradesh	No	Yes subject to conditions	Yes subject to permission in most & Yes in some	No	No in most & Yes in some	Yes	Yes	Yes*	No	Yes	No
Arunachal Pradesh**	Not available	Not available	Yes subject to permission in most & Yes in some	Not available	No in most & Yes in some	Not available	Not available	Not available	Not available	Yes subject to permission	Yes
Assam	Yes subject to conditions	No	Yes subject to permission in most & Yes in some	No in most & Yes in some	No in most & Yes in some	No in most & Yes in some	Yes	Yes	No	No	Yes subject to permission
Bihar***	No	Yes subject to permission	Yes subject to permission in most & Yes in some	Yes	No in most & Yes in some	No in most & Yes in some	Yes	Yes*	Yes subject to permission	Not applicable	Not applicable
Chhattisgarh	No	Yes subject to permission	Yes subject to permission in most & Yes in some	Yes	No in most & Yes in some	No in most & Yes in some	Yes	Yes*	No	No	No
Goa	No in most & Yes subject to permission in some	Yes	Yes subject to permission in most & Yes in some	Yes	No in most & Yes in some	No in most & Yes in some	Yes	Yes*	No	Yes	Yes
Gujarat***	No in most & Yes subject to conditions in some	Yes subject to permission	Yes subject to permission in most & Yes in some	Yes	Yes	No in most & Yes in some	Yes	Yes*	No	Not applicable	Not applicable
Haryana	Yes subject to conditions	Yes subject to permission in most & Yes in some	Yes subject to permission in most & Yes in some	No in most & Yes in some	No in most & Yes in some	No in most & Yes in some	Yes	Yes*	No	No	No
Himachal Pradesh	Yes subject to conditions	No in most & Yes in some	Yes subject to permission in most & Yes in some	Yes	No in most & Yes in some	No in most & Yes in some	Yes	Yes*	No	Yes	Yes
Jharkhand	No	No in most & Yes in some	Yes subject to permission in most & Yes in some	Yes	No in most & Yes in some	No in most & Yes in some	Yes	Yes*	Yes subject to permission	Yes subject to permission	Yes subject to permission
Karnataka	Yes subject to conditions	Yes subject to conditions	Yes subject to permission in most & Yes in some	Yes subject to conditions	No in most & Yes in some	No in most & Yes in some	Yes	Yes	No	Yes subject to permission	Yes subject to permission
Kerala	No in most & Yes subject to conditions in some	Yes subject to conditions	Yes subject to permission in most & Yes in some	Yes	Yes	No in most & Yes in some	Yes	Yes*	No	Yes	Yes
Madhya Pradesh	Yes subject to conditions	No	Yes subject to permission in most & Yes in some	Yes	No in most & Yes in some	No in most & Yes in some	Yes in most & No in some	Yes*	No	No	Yes
Maharashtra	Yes subject to conditions	Yes subject to conditions	Yes subject to permission in most & Yes in some	No in most & Yes in some	No in most & Yes in some	No in most & Yes in some	Yes	Yes*	No	No	Yes
Manipur**	Not available	No	Yes subject to permission in most & Yes in some	Yes	No in most & Yes in some	Not available	Yes	Not available	Not available	No	Yes subject to permission
Meghalaya	No in most & Yes subject to permission in some	No	Yes subject to permission in most & Yes in some	No in most & Yes in some	No in most & Yes in some	No in most & Yes in some	Yes	Yes	No	No	Yes subject to permission
Mizoram**	No	Not available	Yes subject to permission in most & Yes in some	Yes	No in most & Yes in some	No in most & Yes in some	Not available	Not available	No	Not available	Not available
Nagaland**	Not available	No	Yes subject to permission in most & Yes in some	Yes	Not available	Not available	Yes	Not available	Not available	Not available	Not available
Odisha	No	No	Yes subject to permission in most & Yes in some	No in most & Yes in some	No in most & Yes in some	No in most & Yes in some	Yes	Yes*	No	No	No
Punjab	Yes subject to conditions	Yes subject to permission in most & Yes in some	Yes subject to permission in most & Yes in some	No in most & Yes in some	No in most & Yes in some	No in most & Yes in some	Yes	Yes*	No	No	No
Rajasthan	No	Yes subject to conditions	Yes subject to permission in most & Yes in some	Yes	No in most & Yes in some	No in most & Yes in some	Yes	Yes*	No	Yes	Yes subject to permission
Sikkim**	Not available	No	Yes subject to permission in most & Yes in some	Not available	No in most & Yes in some	Not available	Yes in most & No in some	Not available	Not available	Yes subject to permission	Yes subject to permission
Tamil Nadu	Yes subject to conditions	Yes	Yes subject to permission in most & Yes in some	No in most & Yes in some	No in most & Yes in some	No in most & Yes in some	Yes	No	No	Yes	Yes
Telangana	No	No in most & Yes subject to conditions in some	Yes subject to permission in most & Yes in some	No	No in most & Yes in some	Yes	Yes	Yes*	No	Yes	No
Tripura	No in most & Yes subject to permission in some	No	Yes subject to permission in most & Yes in some	Yes	No in most & Yes in some	No in most & Yes in some	Yes	No	No	Yes subject to permission	Yes subject to permission
Uttar Pradesh	Yes subject to permission	Yes subject to conditions	Yes subject to permission in most & Yes in some	Yes	No in most & Yes in some	No in most & Yes in some	Yes	Yes*	No	No	Yes subject to permission
Uttarakhand	No	Yes subject to conditions	Yes subject to permission in most & Yes in some	Yes	No in most & Yes in some	No in most & Yes in some	Yes	Yes*	No	No	No
West Bengal	Yes subject to permission	No	Yes subject to permission in most & Yes in some	Yes	No in most & Yes in some	No in most & Yes in some	Yes	Yes*	No	No	No

Note:

* The Plantation Labour Act does not prohibit women from working in hazardous jobs. For states we did not find the plantation labour rules for, we have taken it to be that there is no prohibition in these states.

**States excluded from our analysis (due to unavailability of majority of the legal provisions):

Arunachal Pradesh: Factories Rules, Shops and Establishment Act, Contract Labour Rules unavailable.

Manipur: Factories Rules, Contract Labour Rules and Inter-State Migrant Workmen Rules

Mizoram: Shops and Establishment Act unavailable

Nagaland: Factories Rules and Inter-State Migrant Workmen Rules unavailable

Sikkim: Factories Rules and Contract Labour Rules unavailable

***Bihar and Gujarat have been excluded from our analysis of Parameter 4 (Can women work in jobs deemed morally inappropriate) since they follow a policy of complete prohibition on the sale and consumption of liquor.

About Prosperiti

Prosperiti builds state capacity to increase economic freedom in India. Our mission is to lift a billion people into prosperity. We analyse state-level regulations, identify opportunities for reform, help build policy consensus, and assist partner states in implementation. Our knowledge products include [State of Regulation reports](#) and bi-weekly [analyses](#).



About The State of Discrimination Series

Each report in this series is a sub-national comparison of legal barriers to women's right to choose work in India. The reports compare states on the amount of economic freedom they offer to women job seekers. This edition of the State of Discrimination measures the change in legal discrimination against female job seekers across Indian states since 2022. For more information, please reach out to us info@prosperiti.org.in.