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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provide dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

# **REGULATING PINK TAX: A LAW AND ECONOMICS APPROACH TO GENDER-BASED PRICE DISCRIMINATION IN INDIAN CONSUMER MARKETS**

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## **Abstract**

When a woman in a Delhi supermarket pays ₹300 for a pink-packaged razor, while the functionally identical blue version for men on the same shelf costs ₹200, this is more than a simple price gap; it is a symptom of a systemic market failure colloquially known as the "pink tax". This article moves beyond framing this issue as a social grievance to diagnose it through the lens of Law and Economics. It posits that gender-based price discrimination operates as a form of *de facto* cartelization, where market players tacitly segment consumers by gender to extract consumer surplus, leading to significant allocative inefficiency and welfare loss. The analysis critiques the inadequacy of India's existing legal framework, particularly the Competition Act, 2002, and the Consumer Protection Act, 2019, arguing that their current application fails to recognize this nuanced form of market failure. Drawing on comparative international jurisprudence, this paper proposes a two-pronged regulatory solution: first, a targeted amendment to the definition of "unfair trade practice" to explicitly include gender-based price discrimination for analogous products; and second, the introduction of an economically efficient "rebuttable presumption" model that places the onus on manufacturers to justify significant price differentials. This framework offers a legally robust pathway to correct the market failure, thereby aligning consumer protection with the constitutional principles of substantive equality.

**Keywords:** Price Discrimination, Law and Economics, Pink Tax, Consumer Protection, Market Failure, Competition Law

## **I. Introduction: Beyond a "Tax" - Conceptualizing a Market Failure**

### **The Analytical Leap: From Social Grievance to Market Failure**

In the bustling, rapidly expanding consumer markets of contemporary India, a pervasive yet legally invisible phenomenon systematically disadvantages half the population. It manifests quietly on store shelves and service menus across the country: a woman's haircut costs 60% more than a man's;<sup>1</sup> a girl's pink scooter is priced higher than its blue counterpart at the same toy store; a pack of women's disposable razors carries a significant premium over the men's version, despite the only discernible difference being the colour of the plastic. This practice, colloquially and somewhat misleadingly termed the "pink tax," is not a government-levied tax but a deliberate corporate pricing strategy that has, until now, been primarily framed as a social grievance or an issue of gender fairness.<sup>2</sup> While these perspectives are valid and vital for raising public awareness, they fail to capture the underlying economic mechanics that render this practice a significant and addressable market failure.

This article makes a crucial analytical leap. It moves beyond the popular "tax" analogy to reframe gender-based price discrimination within the rigorous discipline of Law and Economics. The core thesis is that the pink tax is not merely a collection of isolated, unethical pricing decisions but a systemic, market-wide practice of third-degree price discrimination. This practice functions as an "in-plain-sight cartel," where firms, often without a single word of explicit collusion, tacitly coordinate to segment the market by gender. This segmentation allows them to extract maximum consumer surplus from the group perceived to have a more inelastic demand—women—leading to allocative inefficiency, a net loss of social welfare, and a substantial, continuous wealth transfer from a specific class of consumers to producers. By conceptualizing the issue as a market failure, this paper elevates the discourse from a debate on ethics to a critical examination of economic efficiency and regulatory design, arguing that such practices are not just unfair, but economically suboptimal.

### **The Indian Context: A Dual Economic Burden in a Growing Economy**

The salience of this issue is magnified in the Indian context, a nation characterized by the paradox of a rapidly expanding consumer economy coexisting with deep-rooted gender inequality. The economic burden on Indian women is twofold, creating a pernicious cycle of

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<sup>1</sup> The Price Of Being A Woman, Vidhi Centre For Legal Policy (July 25, 2025)

<sup>2</sup> Pink Tax In India: Meaning, Examples And Impact On Women, Supra Note 1.

disadvantage. First, they face a significant and persistent gender pay gap. The World Economic Forum's Global Gender Gap Report 2025 ranks India at a dismal 131st out of 148 countries, with women's estimated earned income being less than a third of men's.<sup>3</sup> This disparity is not abstract; in the tech sector, for instance, the gender pay gap can be over 30% for professionals with similar qualifications.<sup>4</sup> This structural inequality reduces women's disposable income and financial autonomy from the outset.

Second, the pink tax imposes an additional, insidious layer of economic disadvantage, compelling women to pay more for a wide array of goods and services. Studies and market surveys in India and abroad reveal a consistent pattern: women may pay anywhere from 7% to 13% more for personal care items, with specific products like shampoos and conditioners being up to 48% more expensive than their male-marketed counterparts.<sup>5</sup> This "tax" extends from cradle to cane, affecting everything from children's toys and clothing to adult personal care and senior health products. This dual economic pressure—earning less while paying more—systematically erodes women's purchasing power. It is not merely a matter of a few extra rupees on a bottle of shampoo; over a lifetime, these small, daily penalties accumulate into a significant financial deficit, hindering women's ability to save, invest, and build wealth. This makes the pink tax a "contemporary legal issue" of profound national importance, one that directly challenges the constitutional goal of socio-economic justice and undermines India's potential for equitable growth. When women, who constitute nearly half the population but contribute only 18% to the GDP, are systematically overcharged, the entire economy bears the cost of this inefficiency.<sup>6</sup>

### **Research Gap and Contribution: From Diagnosis to a Regulatory Blueprint**

Despite its clear economic impact, gender-based price discrimination remains a largely unexplored and unregulated frontier in Indian legal scholarship, particularly from an economic perspective. The existing discourse in India has been primarily confined to media reports and consumer rights advocacy. While these are crucial for raising awareness, they often lack the analytical depth required for effective and sustainable policy formulation. Academic studies have confirmed the existence and perception of the pink tax in India, with surveys showing that

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<sup>3</sup> World Economic Forum, The Global Gender Gap Report 2025 (2025)

<sup>4</sup> Same Code, Unequal Pay: The Gender Divide In The Tech Workforce, Centre For Development Policy And Practice (July 31, 2025)

<sup>5</sup> The Price Of Being A Woman, Supra Note 2

<sup>6</sup> Mckinsey Global Institute, The Power Of Parity: Advancing Women's Equality In India (2018).

while many consumers feel the practice is unfair,<sup>7</sup> a significant portion remains unaware of its systemic nature or its long-term financial consequences.<sup>8</sup> However, this body of work has largely stopped short of proposing a comprehensive regulatory solution grounded in sound economic principles.

This paper seeks to fill this critical research gap. It provides one of the first rigorous Law and Economics analyses of the pink tax within the specific context of the Indian legal framework. Its contribution is twofold. First, it provides a robust theoretical model to diagnose gendered pricing not just as discriminatory, but as an economically inefficient market failure. Second, and more importantly, it moves beyond diagnosis to prescription. By critically dissecting the existing legal architecture—and finding it wanting—and by drawing pragmatic lessons from international best practices, this paper proposes a concrete, economically efficient, and legally sound blueprint for regulatory reform. This approach offers a novel pathway for policymakers to address a complex issue that lies at the intersection of consumer protection, competition policy, and constitutional law, providing a solution that is both principled and practical.

The intellectual journey of this paper is structured to build a comprehensive case for intervention. It begins by deconstructing the microeconomic architecture of gendered pricing, laying the theoretical foundation for why regulatory action is justified from an efficiency standpoint. From there, it turns to a critical analysis of India's current legal regime, investigating the regulatory paradox of why laws ostensibly designed to ensure fairness and competition fail to address this specific and pervasive market failure. After a comparative look at regulatory designs in other jurisdictions to extract valuable, hard-won lessons, the paper culminates in a novel, two-pronged proposal for reform, tailored to the unique institutional landscape of India.

## **II. The Microeconomics of Gendered Pricing: A Theoretical and Empirical Framework**

To effectively regulate gender-based price discrimination, it is imperative to first understand its economic architecture. This practice is not arbitrary but is a calculated application of

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<sup>7</sup> Nidhi Dwivedi & Srishti Singh, Attitude Towards Pink Tax In The Indian Population: A Gender-Based Analysis, 12 Int'l J. Indian Psychol. 881 (2024).

<sup>8</sup> Aishwarya Sareen & Sumit, Decoding The Pink Tax In India: Corporate Rationalizations And Consumer Awareness, 4 Int'l J.L. Res. & Analysis 1 (2025)

microeconomic theory. While the term "pink tax" is evocative, the more precise economic diagnosis is third-degree price discrimination, a concept first systematically classified by the British economist A.C. Pigou.<sup>9</sup> This occurs when a seller charges different prices for the same product to different, identifiable groups of buyers, where the price difference is not justified by variations in cost. Gender-based pricing is a textbook example. For this strategy to be successful and profitable, three conditions must be met, all of which are firmly in place within the Indian consumer market for gendered products.<sup>10</sup> Acknowledging the complexity of human behaviour, however, requires us to supplement this classical model with insights from behavioural economics, which help explain why this market failure is so persistent.

### **Modelling Third-Degree Price Discrimination: The Three Pillars of the Pink Tax**

The entire edifice of gendered pricing rests on three economic pillars. The first, and most fundamental, is that the firm must possess market power. In a perfectly competitive market, firms are price-takers; they have no ability to set prices above the prevailing market rate. However, most consumer goods markets, particularly for personal care products in India, are characterized by monopolistic competition. Brands like Hindustan Unilever, Procter & Gamble, and L'Oréal do not sell homogenous commodities; they sell differentiated products. Through branding, advertising, packaging, and the creation of perceived quality differences, they cultivate brand loyalty and create a downward-sloping demand curve for their specific products, granting them the market power necessary to set prices above their marginal cost.<sup>11</sup> This is the foundational prerequisite for any form of price discrimination.

The second condition is the ability to prevent arbitrage. Arbitrage is the simple act of buying a product at a low price in one market segment and reselling it at a higher price in another. If arbitrage were easy and costless, the pink tax would collapse overnight. Men would simply buy the cheaper "male" versions of razors and deodorants and resell them to women, and women would readily buy them, erasing the price differential. But why doesn't this happen? While the technical barriers to arbitrage are low, a far more potent and insidious barrier exists: the social cost created by gendered marketing. Products are not just functional items; they are deeply intertwined with social identity and self-concept.<sup>12</sup> The packaging, scent, and advertising for a

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<sup>9</sup> A.C. Pigou, *The Economics Of Welfare* (Macmillan & Co. 1920).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Gendered Marketing*, The Economics Society, Srcc (Aug. 31, 2025)

"women's" deodorant are designed to affirm a specific notion of femininity. The social cost for a man to purchase and use a product explicitly branded "for women" (e.g., in floral-scented, pink packaging), or for a woman to use a product branded with stereotypically masculine cues (e.g., "Arctic Blast" scent in a dark blue container), is often high enough to act as a powerful deterrent. These deeply embedded social constructs, relentlessly reinforced by billions of dollars in advertising, serve as a highly effective, non-market mechanism for maintaining market segmentation.

The third and final condition is that the firm must be able to identify consumer groups with differing price elasticities of demand and, crucially, charge a higher price to the group with the more inelastic demand. Price elasticity measures how responsive the quantity demanded of a good is to a change in its price. A consumer group with inelastic demand is less sensitive to price changes; they will continue to purchase the product even if the price increases. Gendered marketing strategies are predicated on the assumption—and actively work to create the reality—that women, as a group, have a more inelastic demand for certain products, particularly in the personal care, beauty, and hygiene categories. Societal pressures and norms that place a higher premium on female appearance and grooming contribute to the perception that these products are necessities rather than discretionary luxuries, thereby reducing price sensitivity.<sup>13</sup> This differing elasticity is not merely a pre-existing condition that firms passively exploit; it is a market feature that is actively constructed and reinforced through sustained, gender-targeted advertising that frames products as essential to feminine identity and social acceptance.

### **Welfare Economics Analysis: The Hidden Costs of Consumer Surplus and Deadweight Loss**

From a welfare economics perspective, the primary objective of price discrimination is to capture consumer surplus and convert it into producer surplus (profit). Consumer surplus is the economic benefit a consumer receives when they pay a price lower than the maximum they would have been willing to pay.<sup>14</sup> In a single-price market, all consumers who value the product above the market price receive some surplus. Third-degree price discrimination allows a firm to systematically erode this surplus. By segmenting the market, the firm can charge a higher price ( $P_w$ ) to the female segment (with more inelastic demand) and a lower price ( $P_m$ ) to the

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<sup>13</sup> Expectations And Attitudes Toward Gender-Based Price Discrimination, 20 J. Consumer Aff. 165 (2016)

<sup>14</sup> Consumer Surplus: Definition, Measurement, And Example, Investopedia (Aug. 31, 2025)

male segment. This is graphically represented by the firm treating each segment as a separate market and setting a profit-maximizing price in each. The higher price charged to women directly transfers wealth that would have been their consumer surplus to the firm as additional profit. This is not a creation of new value, but a zero-sum redistribution from one group to another.

Beyond this direct wealth transfer, third-degree price discrimination often leads to allocative inefficiency, resulting in a deadweight welfare loss. Allocative efficiency is the economically optimal state where a market produces an output level at which the price (reflecting the marginal benefit to consumers) equals the marginal cost of production.<sup>15</sup> A single-price monopolist typically produces less than this efficient quantity, creating a deadweight loss. While it is theoretically possible for price discrimination to increase total output and thus reduce this loss (for instance, by opening up a new market segment that would not have been served at the single monopoly price), this is not a guaranteed outcome and is often not the primary effect in markets for essential or near-essential goods. In the case of the pink tax, the higher price charged to women may price some marginal female consumers out of the market entirely. The net result is a misallocation of resources and a reduction in total social welfare—the sum of consumer and producer surplus—compared to what could be achieved in a perfectly competitive market.<sup>16</sup> While the reality is often messier than the clean lines of economic diagrams suggest, the core logic holds: the practice creates both a transfer of wealth and a potential net loss to society.

### **The Behavioral Underpinnings of a Persistent Market Failure**

Classical economic models, with their assumption of rational consumers operating with perfect information, struggle to fully explain the persistence of the pink tax. If a cheaper, functionally identical alternative is available on the next shelf, why don't more women simply switch? This is where behavioural economics provides crucial insights, revealing the cognitive biases that marketers exploit to sustain this market failure.

The framing effect is a powerful cognitive bias where our decisions are influenced by the way information is presented, rather than by the objective facts themselves. Gendered marketing is

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<sup>15</sup> Monopolies And Deadweight Loss, Sacramento State, <https://Library.Achievingthedream.Org/Sacmicroeconomics/Chapter/Monopolies-And-Deadweight-Loss/>

<sup>16</sup> Matthew T. Wansley, An Economic Welfare Analysis Of Price Discrimination, San Jose State University

a masterclass in framing. By using a carefully selected set of gender-specific cues—such as colour (pink versus blue), packaging design (curvy versus angular), and scent (floral versus musk)—marketers create a powerful frame that suggests two products are fundamentally different, even when their active ingredients and core functions are identical. This frame nudges consumers towards the product that aligns with their perceived gender identity, often causing them to bypass a purely rational, price-based calculation.

Furthermore, these marketing strategies actively leverage and reinforce gender stereotypes. Research suggests that consumers subconsciously associate feminine cues with "warmth" and masculine cues with "competence".<sup>17</sup> Purchasing decisions are often acts of identity affirmation; consumers make choices that are congruent with their self-concept and social identity.<sup>18</sup> A woman may choose a higher-priced razor packaged in pink not just because she likes the colour, but because the entire marketing ecosystem has framed it as the "correct" or "appropriate" choice for her.<sup>19</sup> This behaviour, driven by heuristics and social conditioning rather than a pure price-performance analysis, represents a departure from classical rationality. It constitutes a market failure because consumer choices are systematically biased by manipulative marketing frames, leading to economically inefficient outcomes. This bounded rationality strengthens the case for regulatory intervention, as the market, left to its own devices, is failing to self-correct and is instead perpetuating an inefficient and inequitable result.

### **III. The Inefficiency of the Current Indian Legal Framework: A Law and Economics Critique**

A significant regulatory paradox lies at the heart of the pink tax issue in India. Despite a clear economic rationale for intervention and a legal framework ostensibly designed to ensure market fairness, gender-based pricing persists, unchecked and unchallenged. The primary statutes governing market behaviour—the Competition Act, 2002, and the Consumer Protection Act, 2019—are, in their current form and interpretation, structurally and conceptually ill-equipped to address this nuanced form of market failure. This regulatory gap is not merely an oversight but a deep-seated deficiency that requires targeted reform, for which

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<sup>17</sup> Jill J. Avery Et Al., Pink Or Blue? The Impact Of Gender Cues On Brand Perceptions, 5 J. Marketing Res. 115 (2016).

<sup>18</sup> A Feminist Review Of Behavioral Economic Research On Gender Differences, 24 Feminist Econ. 1 (2018).

<sup>19</sup> Id.

the Constitution of India provides a compelling normative impetus.

### **The Competition Act, 2002: A Tool Unfit for Tacit Coordination**

At first glance, the Competition Act, 2002, appears to be a promising instrument. When practiced industry-wide, gender-based pricing produces outcomes that are functionally analogous to a cartel: prices are maintained at a supra-competitive level, consumer choice is artificially constrained by gendered segmentation, and overall consumer welfare is diminished. Section 3 of the Act explicitly prohibits agreements between enterprises that cause or are likely to cause an appreciable adverse effect on competition.<sup>20</sup>

However, the Act's utility is effectively nullified by its high and rigid evidentiary threshold for what constitutes an "agreement." Indian competition jurisprudence, in line with global standards, requires a "meeting of minds" to establish the existence of a cartel.<sup>21</sup> Mere parallel behaviour—such as multiple firms in the personal care industry independently adopting similar gender-based pricing strategies—is legally insufficient. This is known as "conscious parallelism," a state of affairs where firms in a concentrated market, aware of their interdependence, may rationally choose to mimic each other's pricing without any explicit communication. The Competition Commission of India (CCI) requires additional evidence, or "plus factors," to infer collusion from parallel conduct. These factors might include direct communication, actions that would be against a firm's self-interest if pursued independently, or other circumstantial evidence pointing to a concerted practice.<sup>22</sup>

Gender-based pricing operates as a form of tacit collusion. There is no "smoke-filled room" or explicit agreement to be found.<sup>23</sup> Firms independently arrive at the same profitable strategy because they recognize their mutual interdependence and the shared benefits of segmenting the market by gender. The challenges the CCI has faced in prosecuting algorithmic collusion offer a stark and relevant parallel.<sup>24</sup> In both scenarios, anti-competitive outcomes are achieved without a traditional, provable agreement. Pricing algorithms can learn to coordinate prices without direct human instruction, just as marketing departments can learn to coordinate market

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<sup>20</sup> The Competition Act, 2002, § 3, No. 12, Acts Of Parliament, 2002 (India).

<sup>21</sup> Competition Commission Of India, Study Of Cartel Case Laws In Select Jurisdictions - Learnings For The Competition Commission Of India (2022).

<sup>22</sup> Competition Commission Of India, Supra Note 21.

<sup>23</sup> Id.

<sup>24</sup> Shambhavi Jha, An Analysis Of Algorithmic Collusion Under Indian Competition Law: Comparative Study With Eu And Us, 3 Jus Corpus L.J. 1 (2025).

segmentation based on shared, industry-wide heuristics about gender. The Competition Act was designed to combat explicit cartels of the 20th century, not the subtle, market-wide coordination that arises from shared marketing psychologies of the 21st. As such, it is a tool fundamentally unfit for the task of regulating these in-plain-sight cartels.

### **The Consumer Protection Act, 2019: An Ambiguous and Unused Shield**

A more promising, yet currently inadequate, avenue for redress lies within the Consumer Protection Act, 2019 (CPA). The failure of the CPA is not one of scope, but of interpretation and application. Section 2(47) of the Act provides a broad and inclusive definition of an "unfair trade practice" (UTP), encompassing any "unfair method or unfair or deceptive practice" used to promote the sale of goods or services.<sup>25</sup> This definition explicitly includes making false or misleading representations about the standard, quality, or price of a product.<sup>26</sup>

From a Law and Economics perspective, charging a different price for two substantially similar products based solely on gendered packaging is an inherently deceptive practice. The act of differentiating products by purely cosmetic features (like colour or scent) and marketing them to different genders at different price points creates a misleading representation to the consumer. It implicitly suggests that there is a material difference between the products that justifies the price differential when, in economic reality, the function and production cost are largely identical. The consumer is deceived into believing they are paying a premium for a specialized, superior product, when they are merely paying for the gendered frame.

Despite this strong theoretical fit, the application of the UTP provision to gender-based price discrimination has been non-existent in India. Why has this powerful tool remained unused? The primary reason is the provision's ambiguity. The definition of UTP does not explicitly mention price discrimination based on gender or any other demographic characteristic.<sup>27</sup> This lack of specificity has created a chilling effect, fostering regulatory inertia and leaving consumers and consumer rights groups without a clear and effective legal hook on which to hang a complaint. The CPA, in its current form, provides a potential shield that remains locked away due to its own vagueness, a classic case of a law with latent potential that remains unfulfilled due to a lack of interpretive courage or legislative clarity.

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<sup>25</sup> The Consumer Protection Act, 2019, § 2(47), No. 35, Acts Of Parliament, 2019 (India).

<sup>26</sup> D. At § 2(47)(I).

<sup>27</sup> Id.

### **The Constitutional Impetus for Statutory Reform: A Duty to Act**

While the primary statutes fall short, the Constitution of India provides the normative foundation that necessitates legislative action to correct this market failure. The constitutional argument rests not on the feasibility of direct judicial enforcement against private companies, but on establishing a positive obligation for the State to create a statutory framework that gives substantive effect to fundamental rights in the private sphere.

Article 14 of the Constitution, which guarantees "equality before the law,"<sup>28</sup> and Article 15(1), which prohibits the State from discriminating on grounds of sex,<sup>29</sup> are primarily vertical in their application. This means they bind the State and its instrumentalities, not private actors in their commercial dealings. Therefore, a direct writ petition filed against a private company for violating Article 14 by charging a pink tax would, under current jurisprudence, likely fail for not meeting the "state action" doctrine.

The key, however, lies in the often-overlooked horizontal power of Article 15(2). This clause has a direct application to private citizens and entities, stipulating:

"No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to— (a) access to shops, public restaurants, hotels and places of public entertainment..."<sup>30</sup>

A transformative and historically grounded interpretation of this clause is crucial. As legal scholar Gautam Bhatia has argued, the term "shops" should not be read restrictively to mean only physical storefronts.<sup>31</sup> The Constituent Assembly Debates reveal that the framers intended a far broader meaning. Members like Shri Nagappa specifically asked if "shops" included places where services were contracted, like a barber's shop, indicating an understanding that went beyond the mere sale of goods.<sup>32</sup> Dr. B.R. Ambedkar, in response, clarified that he used the word "shop" in its "generic sense," as a place where an owner is prepared to offer his service to anybody seeking it.<sup>33</sup> This historical context supports an expansive interpretation of "shops"

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<sup>28</sup> India Const. Art. 14.

<sup>29</sup> India Const. Art. 15, Cl. 1.

<sup>30</sup> India Const. Art. 15, Cl. 2.

<sup>31</sup> Gautam Bhatia, *Horizontal Discrimination And Article 15(2) Of The Indian Constitution: A Transformative Approach*, 11 *Asian J. Comp. L.* 87 (2016).

<sup>32</sup> 7 Lok Sabha Secretariat, *Constituent Assembly Debates: Official Report 661* (Nov. 29, 1948) (Speech Of Shri S. Nagappa).

<sup>33</sup> *Id.* At 664 (Speech Of Dr. B.R. Ambedkar).

as a synecdoche for the entire sphere of private commercial activity where goods and services are offered to the public.

In this modern, purposive reading, charging a higher price to women for a product constitutes imposing a discriminatory "condition" or "restriction" on their "access" to goods within these "shops". This interpretation establishes that gender-based price discrimination is constitutionally suspect. However, the most effective path forward is not to litigate this on a case-by-case basis against millions of retailers. Rather, the horizontal non-discrimination mandate of Article 15(2) places a positive constitutional duty upon the State to enact legislation to prevent such widespread, systemic violations of a fundamental right. The State cannot remain a passive observer when a practice in the private market so clearly contravenes a core constitutional value. This reframes the proposed amendment to the Consumer Protection Act not as a mere policy choice, but as a constitutional obligation to make the right to non-discriminatory access to the marketplace a substantive, enforceable reality.

#### **IV. Comparative Lessons in Regulatory Design: Efficiency and Enforceability**

Before architecting a solution for India, it is both prudent and instructive to analyze the regulatory models adopted by international jurisdictions that have proactively legislated against gender-based price discrimination. The approaches taken by New York State and California in the United States, while not without their own complexities, offer valuable insights into legislative design, particularly concerning the critical tasks of defining what constitutes a "substantially similar" product and establishing an effective enforcement mechanism. While these models provide a solid foundation, a critical examination reveals opportunities to design a more economically efficient and accessible system for India, one that learns from their successes while avoiding their potential pitfalls.

#### **Global Approaches: The American Experience in New York and California**

New York's General Business Law § 391-u represents one of the earliest and most direct legislative attempts to prohibit the pink tax. The law forbids charging different prices for "substantially similar" goods and services based on the gender they are marketed to.<sup>34</sup> The statute offers a relatively technical and prescriptive definition for "substantially similar" goods,

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<sup>34</sup> N.Y. Gen. Bus. Law § 391-U (Mckinney 2020).

requiring that they share the same brand, have the same functional components, and are composed of at least 90% of the same materials or ingredients.<sup>35</sup> This precise definition, while offering clarity, could also be seen as rigid. Crucially, the law creates a safe harbour for businesses, explicitly allowing for price differences that are justified by gender-neutral cost factors, such as the time, labour, or materials involved in production.<sup>36</sup> Enforcement is vested exclusively in the State Attorney General and local authorities, who can impose civil penalties for violations, but it does not grant consumers a private right of action.<sup>37</sup>

California's Pink Tax Repeal Act (AB 1287), codified as Civil Code § 51.14, takes a similar but arguably more flexible approach.<sup>38</sup> It also prohibits price differentials for "substantially similar" goods based on gender. However, its definition of "substantially similar" is more functional and less prescriptive than New York's. It focuses on the absence of substantial differences in materials, intended use, and functional design, under the same brand.<sup>39</sup> The law explicitly and helpfully states that a difference in colour does not, by itself, constitute a substantial difference.<sup>40</sup> Like the New York law, it provides an exhaustive list of permissible justifications for price differences based on legitimate, gender-neutral cost drivers.<sup>41</sup> Enforcement authority rests with the California Attorney General, who can seek injunctions, restitution, and significant civil penalties.<sup>42</sup> Notably, and mirroring the New York model, the Californian law deliberately does not create a private right of action for consumers, channeling all enforcement through the state apparatus.

### **Key Questions and Insights for an Indian Framework**

The analysis of these international models raises two pivotal questions for designing an effective Indian framework, and in answering them, we can begin to see the contours of a superior, context-specific solution.

First, how can the law define "substantially similar" products without stifling genuine innovation or becoming overly burdensome? This is the central drafting challenge. A definition

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<sup>35</sup> Id. At § 391-U(2)(A).

<sup>36</sup> Id. At § 391-U(3).

<sup>37</sup> Id. At § 391-U(4).

<sup>38</sup> Cal. Civ. Code § 51.14 (West 2023).

<sup>39</sup> Id. At § 51.14(C).

<sup>40</sup> Id.

<sup>41</sup> Id. At § 51.14(D).

<sup>42</sup> Id. At § 51.14(E).

that is too broad could penalize legitimate product differentiation, chilling innovation. Conversely, a definition that is too narrow could be easily circumvented by manufacturers making trivial cosmetic changes to their products. The US models demonstrate a balanced approach by focusing on core functionality and material composition while allowing for cost-based justifications. This ensures that the law targets arbitrary price discrimination based on marketing, not genuine differences in product value or cost. California's functional approach, which explicitly dismisses colour as a substantial difference, appears more robust and future-proof than New York's more rigid, percentage-based formula.

Second, and perhaps more critically, what is the most efficient enforcement model? The American models rely exclusively on state-led enforcement. While this provides a centralized and potentially powerful mechanism, it can also create a significant bottleneck. State attorneys general have limited resources and must prioritize cases based on political and public pressure, meaning many instances of discrimination may go unaddressed. Is this the right model for a market as vast, diverse, and geographically dispersed as India's? I would argue it is not. India's well-established, three-tiered system of quasi-judicial Consumer Commissions (at the District, State, and National levels) presents a unique and powerful institutional advantage. This existing infrastructure is already designed for decentralized, accessible, and consumer-driven dispute resolution. Leveraging this system, rather than creating a new centralized enforcement body, offers a path to a more efficient, responsive, and ultimately more effective enforcement regime. It empowers consumers directly, a feature conspicuously absent from the American laws.

This comparative exercise reveals that while the US laws provide a solid conceptual foundation, there is a clear opportunity to innovate and design a more economically efficient and accessible system for India. By adopting a functional definition of "substantially similar" and, most importantly, by leveraging the existing consumer justice infrastructure and introducing an innovative burden-of-proof mechanism, India can create a model that is both more robust in its legal structure and more responsive to the everyday needs of its consumers.

## **V. A Blueprint for Reform: An Economically Efficient and Legally Sound Solution**

Building upon the economic diagnosis, the critique of the existing legal framework, and the lessons gleaned from comparative analysis, this section proposes a concrete and actionable

blueprint for regulatory reform in India. This is not a call for a radical overhaul of Indian law, but for a precise, surgical intervention. The proposed solution is a two-pronged approach that is both legally sound, anchoring itself within the familiar and functional architecture of the Consumer Protection Act, 2019, and economically efficient, designed to minimize transaction costs and incentivize a market-led correction.

### **The Two-Pronged Solution: A Marriage of Substance and Procedure**

The proposed reform consists of a targeted legislative amendment to the Consumer Protection Act, 2019, which provides the substantive legal basis for a claim, combined with the adoption of an innovative procedural mechanism—the rebuttable presumption model—which makes that substantive right practically enforceable.

#### ***1. Legislative Amendment: Bringing Clarity to the Consumer Protection Act, 2019***

The first and most critical step is to eliminate the legal ambiguity that currently paralyzes any potential action against gender-based price discrimination. This requires a direct and unambiguous amendment to Section 2(47) of the CPA, which defines "unfair trade practice."<sup>43</sup> The amendment would add a new sub-clause to the existing definition, leaving no room for judicial doubt or corporate misinterpretation.

#### **Proposed Text for Amendment:**

A new sub-clause should be inserted into Section 2(47) of the Consumer Protection Act, 2019, as follows:

"(xi) charging a different price for any two goods or services that are substantially similar, if those goods or services are priced differently based on the gender of the individuals for whom they are marketed and intended.

**Explanation I:** For the purpose of this sub-clause, 'substantially similar' goods are those that exhibit no substantial differences in the materials used in production, their intended use, or their functional design and features. A difference in colour, packaging, or scent alone shall not be construed as a substantial difference.

**Explanation II:** For the purpose of this sub-clause, 'substantially similar' services are those that exhibit no substantial difference in the amount of time, difficulty, or cost required for their provision."

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<sup>43</sup> The Consumer Protection Act, 2019,

This proposed language is carefully crafted to achieve several key objectives. It directly addresses the problem by name, removing all ambiguity and providing a clear cause of action. It adopts a functional definition of "substantially similar" inspired by the more robust Californian model, which is flexible enough to apply to a wide range of products yet precise enough to prevent easy circumvention.<sup>44</sup> By explicitly stating that purely cosmetic differences like colour and scent are not substantial, it preempts the most common and disingenuous industry justifications for price gaps. Finally, by including both goods and services, it provides comprehensive protection, covering everything from razors to haircuts.

## ***2. The Rebuttable Presumption Model: An Economically Efficient Enforcement Mechanism***

While the legislative amendment provides the legal foundation, the rebuttable presumption model provides the procedural engine for efficient and equitable enforcement.<sup>45</sup> This model is designed to overcome the significant information asymmetry that lies at the heart of this issue. A consumer standing in a supermarket has no way of knowing the precise production and marketing costs of a product, but the manufacturer has this information readily available. The rebuttable presumption model corrects this imbalance.

### **Mechanism:**

The model would operate seamlessly within the existing framework of the Consumer Commissions. The procedure would be as follows:

- 1. Establishing a Prima Facie Case:** A consumer filing a complaint would only need to establish a *prima facie* case by demonstrating two simple, observable facts: (a) that two products (or services) are "substantially similar" as per the newly defined term, and (b) that there is a significant price difference between the product marketed to their gender and the one marketed to the other. This could be done with photographs and receipts.
- 2. Creation of Presumption and Shift in Onus:** Once this *prima facie* case is established, a rebuttable presumption is automatically created in law that the price differential constitutes an unfair trade practice under the Act. At this point, the burden of proof legally shifts from the consumer to the opposing party (the manufacturer, retailer, or service provider).
- 3. Rebutting the Presumption:** To rebut this presumption and avoid liability, the company

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<sup>44</sup> Cal. Civ. Code § 51.14

<sup>45</sup> Rebuttable Presumption, Thomson Reuters Practical Law

must produce clear and convincing evidence that the entire price differential is attributable to legitimate, verifiable, and gender-neutral cost factors. These justifications would mirror the exceptions provided in the US laws and in the proposed amendment itself, such as demonstrable differences in the cost of materials, labour involved, or manufacturing complexity.<sup>46</sup> Crucially, justifications based on differential marketing costs for gendered campaigns or on the different price elasticities of male and female consumers would be legally inadmissible. Why? Because these are the very tools of the discriminatory practice, not justifications for it. To allow them as a defense would be to render the law meaningless.

This model is profoundly more efficient from a Law and Economics standpoint than the state-led enforcement models seen in the US. It adheres to the Coasean principle of placing the burden of proof on the party that has the easiest and cheapest access to the relevant information—the "least-cost avoider" of information. By shifting the onus, the model dramatically lowers the transaction costs for aggrieved consumers to seek justice, thereby making the legal right to non-discrimination not just a theoretical principle but an accessible and meaningful reality.

### **Anticipating and Engaging with Counterarguments**

Of course, no proposal for market regulation is without its critics. It is important to anticipate and engage with potential objections with scholarly honesty.

A common objection, rooted in classical liberal theory, is that such regulation infringes upon the "freedom of contract" and a seller's right to set prices as they see fit. This argument, while important, is fundamentally flawed in this context. The proposed regulation is not a form of top-down price control; it is a prohibition on deceptive and discriminatory practices. The freedom of contract is not absolute and is predicated on a market free from significant failures like severe information asymmetry and the exploitation of cognitive biases.<sup>47</sup> When a company uses cosmetic framing to mislead a consumer into believing a product is materially different to justify a price premium, the conditions for a truly free and fair contract are absent. The law, in this case, is not violating freedom of contract; it is correcting the market failures that prevent it from functioning properly.

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<sup>46</sup> N.Y. Gen. Bus. Law § 391-U, *Supra* Note 37; Cal. Civ. Code § 51.14

<sup>47</sup> Unfair Trade Practices In India: Real-World Cases And Legal Remedies, Law Blend

Industry stakeholders will undoubtedly raise concerns about "compliance costs." This concern, while understandable, is likely overstated. The law would not burden companies that engage in genuine innovation and product differentiation. It would only affect those whose business model relies on the economically inefficient strategy of cosmetic differentiation for the purpose of price discrimination. In the long run, the regulation would incentivize a market shift towards greater transparency and competition based on actual value, which is a net efficiency gain for the entire economy. The threat of legal action under the new, clearer standard would encourage proactive compliance, leading to a market-wide correction. This regulatory push could catalyze a move away from lazy, stereotype-based marketing and towards more innovative, gender-neutral branding and product development, ultimately fostering a healthier and more competitive market.

Finally, one must acknowledge the complexity of the issue itself. Are there no cases where a product for women might have a legitimately higher cost of production? It is certainly possible. However, this is precisely what the proposed model is designed to accommodate. The rebuttable presumption is not an irrebuttable one. The framework explicitly provides a pathway for companies to justify price differences based on real, gender-neutral cost factors. This demonstrates that the goal is not to punish businesses, but to eliminate arbitrariness and deception from the marketplace.

## **VI. Conclusion**

When women pay more for pink razors while men pay less for blue ones, most see unfair pricing. But there is a deeper story here, one of economic inefficiency, tacit coordination, and regulatory failure. This paper has endeavored to reframe the debate on the "pink tax" in India, moving it from the realm of social commentary to the analytical domain of Law and Economics. The central argument advanced is that gender-based price discrimination is not a collection of benign marketing choices but a systemic market failure. It operates as a form of third-degree price discrimination, enabling firms to tacitly coordinate the segmentation of the consumer market to extract surplus, which results in a net loss of social welfare and reinforces a pernicious cycle of economic inequality. This practice persists not because of a lack of harm, but because of a combination of market power, social norms that cleverly prevent arbitrage, the exploitation of behavioural biases, and a legal landscape that is simply not fit for purpose. A critical examination of India's legal framework reveals a significant regulatory deficit. The

Competition Act, 2002, with its high evidentiary standard for "agreements," is structurally incapable of addressing this form of tacit collusion. The Consumer Protection Act, 2019, while holding immense potential, contains an ambiguous definition of "unfair trade practice" that has, to date, failed to provide a viable remedy for consumers. This statutory gap exists despite a clear constitutional impetus for reform rooted in the horizontal non-discrimination mandate of Article 15(2), a mandate that imposes a positive duty on the State to ensure non-discriminatory access to the marketplace for all its citizens.

To remedy this failure, this paper has proposed a robust, two-pronged solution that is both principled and pragmatic. The first prong is a clear legislative amendment to Section 2(47) of the Consumer Protection Act, 2019, to explicitly define gender-based price discrimination for substantially similar goods and services as an unfair trade practice. This provides the necessary legal certainty. The second, and more innovative, prong is the adoption of a rebuttable presumption model. This procedural mechanism is designed for economic efficiency, placing the burden of justifying price differentials on the manufacturers and sellers who hold all the relevant cost information. This model empowers consumers, dramatically reduces the transaction costs of seeking justice, and leverages India's existing and effective consumer redressal infrastructure.

This proposed framework is a balanced, targeted, and necessary intervention. It corrects a demonstrated market failure without imposing undue burdens on legitimate commercial activity. It aligns Indian consumer law not only with international best practices but also with the foundational constitutional promise of substantive equality. In the context of a modern, rapidly evolving Indian economy, the adoption of such economically-informed and rights-affirming laws is not merely desirable; it is essential. Addressing gender-based price discrimination is a crucial step in building a marketplace that is not only more efficient but also fundamentally more just, ensuring that the cost of being a woman in India is not artificially and unfairly inflated by the very market that should serve her.