EQUAL PAY FOR EQUAL WORK WITH REFERENCE TO GENDER EQUALITY

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ABSTRACT

Equal pay for equal work mandates equal pay for individuals that do the same type of work. It is enshrined in international instruments like the ILO Constitution, Equal Remuneration Convention, UDHR, CEDAW, etc. and in Article 39(d) of the Indian Constitution. It is most commonly applicable in the context of gender-based discrimination in pay—work of a person being valued based on their gender. Such practice is rooted in the theories of sexual division of labour and separate spheres. Equal pay for equal work is a constitutional goal, and an imperative when protecting and upholding an individual's right to dignity.

1. INTRODUCTION

'Equal pay for equal work' is the principle which states that individuals in the same workplace, doing equal work, must be given equal pay. This principle is used in cases wherein equality is to be established between the pay of regular and casual employees; of permanent and temporary employees; and of full-time and part-time employees; or wherein equality is established between workers on the basis of age, race, disability, historical reasons, educational qualifications, etc.

The issue of unequal pay for equal work pervades workplaces at multiple levels and threatens the goal of equality—a fundamental as well as human right. The principle of equal pay for equal work is most commonly applicable in cases of gender-based discrimination. Under the Constitution of India, Article 39(d) lays down that the State shall, in particular, direct its policy towards securing equal pay for equal work for both men and women. Thus, it becomes important to study the principle of equal pay for equal work in the context of gender equality.

In this article, Part II studies the principle of equal pay for equal work in the context of international instruments. Part III traces the history of the said principle in the Indian context,

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and delineates its operation through legal pronouncements and official committee reports. It deliberates upon whether Article 39(d) is enforceable, in light of its status as a DPSP, and whether any difference in pay is reasonable as under Article 14 of the Indian Constitution. In Part IV, it is explored whether there is an underlying rationale behind unequal pay for equal work solely on the basis of gender, and the principle of equal pay for equal work is construed specifically in light of gender equality. Part V highlights the impact and significance of the principle in establishing and furthering gender justice and equality, and concludes with suggestions.

2. EQUAL PAY FOR EQUAL WORK IN INTERNATIONAL INSTRUMENTS

2.1 Constitution of the International Labour Organisation (ILO), 1919:

The Preamble of the ILO Constitution recognises the need for improvement of conditions of labour, since they are riddled with injustice, hardship and privation to a large number of people, endangering peace and harmony. An improvement of the said conditions can be achieved through an adequate living wage, the protection of women, children and young persons, the recognition of the principle of equal remuneration for work of equal value, etc.

2.2 Universal Declaration of Human Rights (1948) (UDHR):

Article 23[2] of the UDHR affirms the right to equal pay for equal work without any discrimination, the right to just and favourable remuneration which ensures for workers and their family an existence worthy of human dignity, along with other means of social protection if necessary, and the right to just and favourable conditions of work, etc.

2.3 Equal Remuneration Convention, 1951:

The ILO, through this Convention, addressed the issue requiring all Member States to direct their national laws and policies towards guaranteeing equal remuneration to all workers, regardless of gender.

[2] Universal Declaration of Human Rights (1948) Art. 23:
"1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
2. Everyone, without any discrimination, has the right to equal pay for equal work.
3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
4. Everyone has the right to form and to join trade unions for the protection of his interests."

The principle finds mention in the Preamble of the Convention; as also Article 1(b), which defines "equal remuneration for men and women workers for work of equal value" for the purposes of the Convention as the rates of remuneration established without discrimination based on sex; and Article 2(1), which imposes an obligation upon Member States to promote the application of the principle of equal remuneration for men and women workers for work of equal value to all workers.

Article 3(3) cautions that differential rates between workers corresponding to differences in the work to be performed, without regard to sex, shall not be considered to be contrary to the principle of equal remuneration for men and women workers for work of equal value.

However, the ILO clarifies that the principle of equal remuneration for work of equal value is not the same as that of equal pay for equal work. The former concept is broader and encompasses cases wherein persons do different work of equal value. The latter concept, i.e., equal pay for equal work, limits its application to work undertaken by individuals in the same area of activity and in the same enterprise.

2.4 Discrimination (Employment and Occupation) Convention, 1958:

This Convention aims to eliminate all discrimination in respect of employment and occupation, whether based on sex, race, colour, religion, political opinion, national extraction or social origin, or any other criterion determined by States parties to the Convention.

2.5 Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW):

Article 11 of CEDAW deals with employment, outlining the right to work for women as an inalienable right of all human beings. It mandates ensuring equal opportunities to choose one's profession and receive equal pay for work of equal value, along with the right to social security, paid leave, maternity leave, etc.

Inter alia, Article 11(1)(d) provides that "*States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular, the right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work*".

3. EQUAL PAY FOR EQUAL WORK IN THE INDIAN CONTEXT

3.1 Historical Developments:

Article 39[3] of the Indian Constitution enshrines the principle of equal pay for equal work. It relates to a basic social minimum guarantee, part of the Rawlsian constitutional essentials.[4]

As a signatory to CEDAW, India is internationally obligated to enshrine gender equality in its domestic legislations, repeal all discriminatory provisions in its laws, and enact new provisions to guard against discrimination against women.

India has been a permanent member of the Governing Body of the ILO since 1922, thus being bound by its Constitution. India ratified the Equal Remuneration Convention in 1958, and the Discrimination (Employment and Occupation) Convention in 1960.

In 1974, the Committee on the Status of Women in India, in its Report titled "Towards Equality" noted that the Constitution guarantees equality of opportunity in matters relating to employment and directs the State to secure equal rights to an adequate means of livelihood, equal pay for equal work, just and humane conditions of work, and India has ratified the ILO Conventions.

Yet, the shifting emphasis towards equality and greater employment opportunities did not find reflection in Indian laws, especially in the case of the unorganised sector. A considerable number of women participate in the economic process for no returns nor recognition; on sufferance, without equal treatment, security of employment and humane conditions of work.

The Committee recommended certain changes in the legal system, including the equalisation of wages through legislative enactment of Article 39(d) so as to add the weight of legal sanction to the DPSP, and also the incorporation of the principle in the Minimum Wages Act, 1948.

In order to ensure compliance with the Equal Remuneration Convention and in response to the aforementioned Report, the Parliament enacted the Equal Remuneration Act, 1976,[5] which aimed at providing for the payment of equal remuneration to men and women workers

[3] The Constitution of India, Art. 39(d): "The State shall, in particular, direct its policy towards securing that there is equal pay for equal work for both men and women."
[4] Tarunabh Khaitan, "Directive Principles and the Expressive Accommodation of Ideological Dissenters" (2018) 16(2) *ICON* 389.
[5] Act No. 25 of 1976.

and for the prevention of sex-based discrimination against women in the matter of employment and for matters connected therewith or incidental thereto.

In 2015, the High Level Committee submitted its Report on the Status on Women,[6] noting that change in social norms and mindsets towards girls and women can be brought about through institutional initiatives, particularly those of the State, which can initiate, strengthen and ensure implementation of its economic, and social policies for gender equality. This will have a strong and effective impact on the subjective changes in perceptions and expectations towards girls and women. The Committee highlighted the need for specific provisions for women workers regarding equal pay for equal work, inter alia, in the Unorganised Workers' Social Security Act, 2008.

The Code on Wages was enacted in 2019, which repealed the Equal Remuneration Act, inter alia, in order to facilitate the implementation of the multiple labour legislations without compromising on the basic concepts of welfare and benefits to workers.

3.2 Judicial Construction:

The principle of equal pay for equal work was originally considered incapable of being enforced in a court of law, Articles 39(d) and 14 being mutually exclusive.[7]

However, in *Randhir Singh v. UOI*[8], the Supreme Court noted that while the principle of equal pay for equal work is not expressly a fundamental right, it is a constitutional goal. The word 'Socialist' in the Preamble must mean at least 'equal pay for equal work', if not 'to each according to his need'. DPSPs have to be read into fundamental rights as a matter of interpretation, and thus, construing Articles 14 and 16 in light of the Preamble and Article 39(d), the principle of equal pay for equal work is deductible. The principle functions as a constitutional remedy under Article 32.

In *Mackinnon Mackenzie & Co. Ltd. v. Audrey D'Costa*[9], the principle received due recognition again when the Court ruled in favour of lady stenographers in a claim for equal remuneration for lady stenographers and male stenographers, and observed that the Equal

[6] Government of India, Report of the High Level Committee on the Status of Women in India (Ministry of Women and Child Development, 2015).
[7] Kishori Mohanlal Bakshi v. Union of India, AIR 1962 SC 1139.
[8] (1982) 1 SCC 618.
[9] (1987) 2 SCC 469.

Remuneration Act, 1976 came to be enacted in order to implement Article 39(d) of the Indian Constitution and the Equal Remuneration Convention.

In *Secretary, Ministry of Defence v. Babita Puniya*[10], the Supreme Court dwelt on the need to change mindsets if equality for women is to be achieved in the Armed Forces. The submissions advanced for exclusion of women therefrom were based on deeply entrenched sex stereotypes premised on assumptions about socially ascribed roles of gender which discriminate against women without a constitutionally valid basis for denying equal opportunity to them—submissions that domestic obligations rest solely on women, that women are the "weaker" sex and may not undertake tasks "too arduous" for them, ignore the solemn constitutional values which every institution in the nation is bound to uphold and facilitate.[11]

In *UOI v. Lt. Cdr. Annie Nagaraja*[12], while adjudicating upon the restrictions imposed on women in the Indian Navy,[13] the Supreme Court observed that "*the battle for gender equality is about confronting the battles of the mind. ... A hundred and one excuses are no answer to the constitutional entitlement to dignity, which attaches to every individual irrespective of gender, to fair and equal conditions of work and to a level playing field, which ensures that women have the opportunity to overcome their histories of discrimination.*" It was further observed that a commitment to equal worth and dignity of every individual belies the socially ascribed gender roles, and the performance at work and dedication to the cause of the nation are the surest answers to prevailing gender stereotypes.[14]

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[10] (2020) 7 SCC 469.

[11] Observed D.Y. Chandrachud, J., "Seventy years after the birth of a post-colonial independent state, there is still a need for change in attitudes and mindsets to recognize the commitment to the values of the Constitution." He further noted that though courts are conscious of limitations which issues of national security and policy impose on the judicial evolution of doctrine in matters relating to the Armed Forces, the time has come for a realisation that women officers in the Army are not adjuncts to a male dominated establishment whose presence must be "tolerated" within narrow confines. The salient decision of the Union Government to extend PCs to women SSC officers in all ten streams in which they are commissioned is a step forward in recognising and realising the right of women to equality of opportunity in the Army. "This marks a step towards realising the fundamental constitutional commitment to the equality and dignity of women."

[12] 2020 SCC OnLine SC 326.

[13] During the drafting of the Navy Act, 1957, on the restriction proposed to be imposed on the appointment of women in the Indian Navy, four members of the Joint Committee dissented thus: "… In almost all countries women have proved themselves to be equal to men if not more and today there is no sphere of life nor is there any kind of work where women cannot compete with men. … This injustice done to our women should be removed…"

[14] It was held that to deprive serving women officers of the opportunity to work as equals with men on PCs in the Indian Navy is plainly discriminatory. Furthermore, to contend that women officers are ill-suited to certain avocations is contrary to the equal worth of the women officers who dedicate their lives to serving in the cause of the nation.

The Court has evolved certain considerations and dimensions to the principle of equal pay for equal work over the years. For instance, the said principle is applicable only among equals and not among unequals. Discrimination in prescribing scales of pay on the basis of certain qualifications is valid. If persons perform the same work and the State denies them equality in pay, its action would be violative of Articles 14 and 16. However, the question of violation of those Articles will not arise if it is found that the classification made by the State in giving different treatment is founded on a rational basis having nexus with the objects sought to be achieved.[15]

Equal pay for equal work has assumed the status of a fundamental right in service jurisprudence, having regard to the constitutional mandate in Articles 14 and 16.[16] It is part of the constitutional philosophy ensuring a welfare socialistic pattern providing equal opportunity to all and equal pay for equal work for similarly placed employees.

However, the principle does not have a mechanical application in every case of similar work.[17] The pay structure of government employees should reflect social values as well.[18]

The principle cannot be invoked invariably in every kind of service. Particularly in the area of professional services, it is open to the State to classify employees on the basis of qualifications, duties and responsibilities of posts.[19] However, so long as the work done is similar, the process of selection of the workers is altogether irrelevant and immaterial for the purposes of the applicability of the doctrine.[20] Workers who have been in continuous employment for long periods of time are entitled to claim the salary as is paid to regular and permanent employees.[21]

It is fallacious to determine artificial parameters to deny fruits of labour, especially in a welfare state. Besides being demeaning, such action strikes at the very foundation of human

[15] V. Markendeya v. State of Andhra Pradesh, (1989) 3 SCC 191; Govt. of West Bengal v. Tarun K. Roy, (2004) 1 SCC 347.
[16] Grih Kalyan Kendra Workers' Union v. Union of India, (1991) 1 SCC 619; Union of India v. Dineshan K.K., (2008) 1 SCC 586.
[17] State of Uttar Pradesh v. J.P. Chaurasia, (1989) 1 SCC 121.
[18] The government has to consider principles such as the degree of skill, strain of work, experience, training required, responsibility undertaken, mental and physical requirements, etc., while fixing pay scales. Other relevant factors include the method and level of initial recruitment, educational and technical qualifications, etc., as well as the paying capacity of the government; observed in Delhi Veterinary Association v. Union of India, (1984) 3 SCC 1.
[19] Mewa Ram Kanojia v. All India Institute of Medical Sciences, (1989) 2 SCC 235.
[20] Bhagwan Dass v. State of Haryana, (1987) 4 SCC 634.
[21] Jeet Singh v. M.C.D., 1986 Supp (1) SCC 560: the petitioners had been in continuous employment for seven years.

dignity. Paying someone less wages in comparison to others similarly situated, constitutes an act of exploitative enslavement.[22] Acceptance of unequal pay scales by employees does not absolve the employer of the liability under Article 14.[23]

4. EQUAL PAY FOR EQUAL WORK AS AN INSTRUMENT OF GENDER EQUALITY

All sectors of the economy do not have a comprehensive and transparent wage policy. In sectors or occupations predominated by women, the minimum wages are often lower than in those predominated by men, due to poor representation of women in bargaining processes despite them comprising the major section of the informal sector.[24]

However, a deeper issue runs thereunder—society tends to undervalue women's work. Wage discrimination results from restrictive confinement of women to limited types of work, without suitable criteria for the exclusion.[25]

The sexual division of labour between men and women ascribes rigid gender roles on persons and accordingly valuates the work they do. Men's work is understood as requiring skill, while women's work is perceived as an unpaid obligation. Women are confined to the domestic realm and domestic labour, which also impacts their treatment in the workplace—discrimination, deprivation of positions of power and leadership, and increased violence.[26]

Plato was the first to reject the "separate spheres" theory[27] in 375 BC in his book 'Republic', remarking upon equality of opportunity for women in modern civilisation, and that discriminatory treatment can only be justified if a relevant difference is found.[28]

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[22] State of Punjab v. Jagjit Singh, (2017) 1 SCC 148.
[23] Dhirendra Chamoli v. State of Uttar Pradesh, (1986) 1 SCC 637.
[24] ILO, General Survey on Minimum Wage Systems (February, 2014).
[25] Government of India, Report of the Committee on the Status of Women in India "Towards Equality" (Ministry of Education and Social Welfare, 1974).
[26] "AWARENESS ABOUT THE RIGHTS OF WOMEN CAN BE TRULY MEANINGFUL IF THAT AWARENESS IS CREATED AMONGST THE YOUNGER GENERATION OF MEN IN OUR SOCIETY": JUSTICE CHANDRACHUD, https://www.livelaw.in/top-stories/justice-dy-chandrachud-empowerment-of-women-legal-awareness-nalsa-ncw-intersectionality-sexual-division-of-labour-184737 (last updated on Oct. 31, 2021).
[27] The separate spheres theory is a set of beliefs as to the "proper" roles of men and women in society; the former is relegated to the domestic or private sphere while the latter functions in the public or social sphere. These gender differences in society are seen as innate, rather than culturally or situationally created; such differences lead men and women to freely participate in different spheres of society; and these gendered differences in participation in public and private spheres are natural, inevitable, and desirable.

The purpose of Article 39(d) is to fix certain social and economic goals for avoiding gender-based discrimination in matters relating to pay. A wider principle has been extracted regarding categories based on more than just binary gender, by reading the DPSP with Articles 14 and 16.

Though not a constitutional right and hence not enforceable on its own, it is a socio-legal imperative and a constitutional goal, available to every individual and capable of being attained through enforcement of the fundamental right to equality.

However, a difference in pay is reasonable as under Article 14, provided the classification[29] for such difference is reasonable, and has a rational nexus with the object sought to be achieved.[30] Equal pay is only for equal work, the same way that unequals cannot be treated equally. A flexible approach is required to be taken while deciding which kinds of work may be similar by considering the duties actually performed as a part of the job, and not the duties potentially capable of being performed.

The Constitution is a transformative document seeking to remedy the structural inequalities rooted in patriarchy, by securing material entitlements and providing public affirmations of dignity and equality of women. Legislations have been enacted to that effect. However, there is a great divergence between ideals of the law and the real state of the society, injustice against women is still rampant and ever-increasing. In order for women to avail their rights it is important to spread legal awareness among them.

5. CONCLUSION

The concept of minimum wages is connected intrinsically to a worker's dignity. Any person compelled to work at a lesser wage does not do so voluntarily, but at the cost of their self-respect, dignity and integrity. With the twin evils of poverty and unemployment, most people are forced to take employment on whatever terms offered by the employer. Arguments of

[28] MAKING GENDER EQUALITY AT WORK A JUSTICIABLE RIGHT FOR WOMEN IN THE PRIVATE SECTOR, https://www.theleaflet.in/making-gender-equality-at-work-a-justiciable-right-for-women-in-the-private-sector/ (last visited on Nov. 01, 2021).

[29] Examples of acceptable classifications include those based on educational qualifications, technical skill required, etc.

[30] State of West Bengal v. Anwar Ali Sarkar, AIR 1952 SC 75, wherein the twin test for reasonable classification was propounded as follows: (1) the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others; and (2) that differentia must have a rational relation to the object sought to be achieved by the Act.

workers' awareness of such terms beforehand is exploitative. A welfare State committed to a socialist pattern of society especially cannot claim so.

DPSPs are not mere pious declarations, but directions from the Constituent Assembly to the future legislature and executive in the exercise of their power. Directions like equal pay for equal work and gender equality must not be effectuated by mere lip service—they must be the basis of legislative and executive actions in the matter of governance of the country.

The act of not remunerating persons according to the work they perform on grounds of gender is also against labour jurisprudence.

In a society wherein women are already subjugated, equal pay for equal work is a goal which secures equality of their status in the workplace, and goes a long way towards the overall equality and empowerment of women by recognising their work as valuable.

Achieving gender equality and tackling gender discrimination at work through a transformative agenda are a key element of reducing inequality overall, especially in light of the impact of COVID-19 on the gender pay gap.

Women are largely still regarded as inferior both at home and in the workplace. Yet, improvement has been witnessed in some aspects, which presents hope for the future, with increasing societal awareness and sensitisation.

There is an added risk to transgenders whose very identity gets negated in every sphere—their dignity threatened and laws for them very skewed. *NALSA v. UOI* (2014) was a step towards the amelioration of their status.

Today, when dignity is undoubtedly and undeniably entwined with the right to life, it becomes imperative to afford the same to every individual. Thus, equal pay for equal work is a provision to protect every worker from unfair disparity in pay.