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DPSP (Equal Pay For Equal Wages)

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ABSTRACT

Women's Rights are Human Rights', a slogan was officially raised in the Vienna Conference on Human Rights, where India stood as one of the member states to ratify the International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). It reaffirmed that women were "an inalienable, integral and indivisible part of universal human rights", bringing to the fore the worth of the lives and dignity of women. For ages in India, there have been abuses done to women in the name of culture or religion, which are hidden by the sanctity of the so-called private sphere. Especially, the practice of cultural relativism by the Indian legislature does neither venerate nor embolden the universality of human rights. However, subsequent to the Vishaka's landmark judgment, judicial activism is holding accountable the perpetrators of such human rights violations, who had enjoyed the immunity for ages, by inserting the rights of women and gender equality at a higher pedestal and by questioning the validity and legitimacy of certain rampant patriarchal personal laws, with the help of both domestic and international laws. Henceforth, in this paper, the author aims to elucidate that though cultural relativism impedes the advancement of women's rights, the judgement in the case of and similar cases to the Vishaka evidently prove that the Indian judiciary goes the other way around by proactively using international law to strengthen women's rights through the harmonious application of CEDAW and the domestic fundamental laws.

Keywords: *Judicial Activism, Women's Rights, Vishaka Judgement, CEDAW, Cultural Relativism.*

I. INTRODUCTION

One of the question that comes to the mind is what is it that we desire after the primary needs like food and shelter? So maybe the answer could be that we desire for social security. As we know that India is a welfare state and an employee who is engaged in an activity cannot be paid any less than that is engaged in the same activity and is performing the same part of responsibilities and duties. It was held by the Apex Court of India that our nation has been a signatory party for the past 38 years of Art 7 of the ICESCR (International Covenant on Economic, Social and Cultural Rights). It was said by the bench that any activity where two

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people are performing the same task but are paid differently establish an act of exploitation and it shall not be entertained. In India, a major part of the population is under the poverty line, they keep up and accept whatever wages are given to them even if it's lesser than the minimum wage guidelines issued by the government. The pressure to send their children to school, provide them with education and to be able to afford daily bread for their family, in this cultural set up it has become difficult to survive and this forces them to be a part of the unfair culture of unequal pay for equal work.

Pay Gap is an issue which has become a topic of national concern due to the increasing cases of discriminatory wages. We, as a welfare and democratic institution, lack in the application of apparent equal pay policy.

II. RIGHT OF AN EMPLOYEE: EQUAL WAGES FOR EQUAL WORK

Not in India but also around the world Equal pay for equal work is unspoken in terms of the gender pay gap. Equal pay for equal work basically means that working environment concept of giving equal wages and facilities to a man and a woman doing the same work with the same amount of responsibilities and duties. The Indian Constitution does not expressly grant this right as fundamental or constitutional but various provisions in the Constitution of India point towards the implementation of equal pay for equal work.

Article 14 – Equality before the law that is men and women having equal rights and opportunities in the political, economic and social spheres.

Article 15(1) which talks about prohibition of discrimination on grounds of caste or sex and **Article 15(3)** which mentions about the various special provisions laid down which grants various powers to the state to make positive discrimination in favor of women.

Article 16: it grants special rights which include laws to be made for the benefit of women and children.

Article 39: deals with principles that are to be followed by the state for laying down policies regarding equal pay for both men and women.

Article 42: The State is required to make provisions for ensuring just and humane conditions for a woman in the workplace and ensure proper provisions are being followed and made regarding maternity relief.

Article 51(A)(e): To quit the practices derogatory to the dignity of a woman.

The principle of Equal Pay for Equal work was first introduced in the year 1962 in *Kishori Mohanlal Bakshi v. Union of India*. The Supreme court rejected this plea of equal work and

equal pay. Later in 1982 In *Randhir Singh vs. Union of India*, the Apex Court recognized and held that the principle of “equal pay for equal work” though is not a fundamental right but, is certainly a constitutionally valid principle under Art 14, 39 clause(c) and Article 16 and hence capable of being enforced through constitutional remedies granted under Article 32 of the constitution. *Punjab and Ors v Jagjit Singh and Ors* also hold a significant place in the history and evolution of equal wages for equal work. In this judgement, a bench of Justice J S Khehar and S.A Bobde held that the principle of equal pay for equal work has to be made applicable to those engaged as daily wagers, casual and contractual employees who perform the same duties as the regulars and, termed the denial of equal pay as “exploitative enslavement” “Coercive” and “oppressive suppression”.

(A) Current laws for equal pay for equal work²

Workmen’s Compensation Act, 1923

Objectives of Workmen’s Compensation Act, 1923:

- Aims to provide financial protection to the dependents of the worker in case of accidental injury by paying compensation. Thought this was only for a certain class of employers.
- Due to the difference in bargaining power, there are high chances that women may be subject to exploitation.
- These above-listed risk factors are discussed in this act with listed suitable measures.

Minimum Wages Act, 1948

Objectives of Minimum Wages Act, 1948:

- Providing for statutory fixation of minimum wages.
- Workers are poorly paid & have less bargaining power in India.

Factories Act, 1948

Objectives of Factories Act, 1948:

- Introduced to regulate the conditions of labourers employed in the factories and industries.

Contract Labour (Regulation and Abolition) Act, 1970

² ‘Equal Pay for equal work and success of pay equity legislation’, article, <https://blog.ipleaders.in/equal-pay-for-equal-work-and-success-of-pay-equity-legislation/>.

Objectives of Contract Labour (Regulation and Abolition) Act, 1970:

- This Act provides for a separate provision for utilities and fixed working hours for women.

Equal Remuneration Act of 1976

Objectives of Equal Remuneration Act of 1976:

- Provides for equal pay to men & women for their equal work.
- This Act was enacted by keeping in mind the unequal physical & social burden a woman faces at the time of pregnancy & rearing

Code on Wages 2019

Objectives of Code on Wages 2019:

- Moved away from the binary sexual arrangement of men and women.
- Recognized the need for equal pay for equal work for all genders.
- Increased the arenas of the benefit of the law to other oppressed genders, including transgenders.
- Allowed the government to declare that the difference in wages of men and women workers but not on the bases of sex.
- Section 16 gave the government the power to declare the unequal equal, without reasons or explanations as to why.

(C) The gender pay gap and the struggle for equal pay

Though equal pay for equal work is a conclusive policy as pointed out in many judgements and though it is well mentioned in the constitution, the extent of application of this principle in real life is still a question.

The gender pay gap is understood as the difference between the income of a male and a female despite doing the same work with equal workload and responsibilities. In the year 2013, the gender pay gap came out to be 24.82%. It was also found that India ranks amongst the last 10 in female participation. This proves that not only females are paid less but also they are not being recognized for their work and the representation is nor fair.

The major contributing factors in the creation of the gender gap in a community are:

- Occupational Priorities
- Cultural barrier

- Direct discrimination
- Undervaluation of women's competence and skills
- Lack of education and training

The female participation is very low in the labour market mainly in rural areas and agricultural field. The labour in rural areas is strictly divided by gender and so is the work. Social and cultural norms within India are also observed as hostile for women. Childcare is considered a woman's primary job. Many organisations and firms do not hire married women with children as they consider that women won't be able to work with full potential as they have their family and responsibilities to manage. The promotion rates of women are also not very high. Women are paid fewer wages after coming back from maternity leave considering that they were on a break for 4 months. Female workers are considered as a burden as they are considered as potential mothers and may leave the organisation once they get married and settled. The gender pay gap also reflects the division of household labour according to gender, caring for the sick and elderly, raising children and domestic chores are considered to be the responsibilities of a woman.

Since domestic work is not shared equally between men and women, women are experiencing more frequent career breaks, mostly in order to raise children and take care of the elderly in the family. This, in turn, has negative consequences for their careers. The literacy rate, in India, of women, is very low, the reason for being a good percentage of girls in rural areas drop out to get married. Education is not considered as a necessity for girls as the man is considered the breadwinner.

(D) Pay equity, minimum wage and equality at work

Research shows that gender discrimination mostly favours men in many domains including the workplace. Equality is people being treated fairly regardless of gender, race, disability, religion, nationality, sexual orientation or age. Discrimination affects many aspects of the lives of women from career development and progress to mental health disorders. Equality at work or school means making sure that people are given equal opportunities, equal pay and accepted for their differences. Gender inequalities, impact various indexes like India's sex ratio, educational qualification of women, and economic conditions. Gender inequality in India is a multidimensional issue that concerns men and women both.

Pay equity is defined as equal pay for equal work having equal value. Every worker has the right to expect equal pay for equal work irrespective of what gender, religion, nationality, age or physical or mental disability whether they are working full-time or part-time. In addition,

much attention has been paid to paying equity in recent years. In general, this means compensating employees for the same or similar duties while taking into account other factors, such as their level of experience, work performance and tenure with the employer.

The question that arises is why pay equity is necessary? Many managerial theorists have explained that to achieve maximum efficiency and creativity in any organization the core ingredient is a healthy and uplifting environment to the employees. The organization cannot grow if the employees are not happy and motivated. Pay equity helps to fill that gap and increases the commitment of every employee towards the organization.

With the concept of equal pay also emerges the concept of the minimum wage. Paying equally is not all, there is a minimum wage which is defined as a minimum amount of money that shall be paid by the employer for the work performed by that person for a given period of time and this wage cannot be reduced by a collective agreement agreed upon by both the parties. In India, the minimum wage set by the Government of India is 176 rupees which are approximately 3\$ for an ideal eight-hour work. Relaxation can be given by local authorities and may vary from state to state. The daily wage cannot fall below the set limit of the local authorities.

III. FLAWS IN INDIAN LAW

Code of Wages 2019 was replaced by Equal Remuneration Act, 1976. This legislation deals with equal pay for equal work for both men and women without any discrimination. This was an opportunity to amend this act, fill major gaps and bring crucial changes in accordance to the 21st century's need of the hour.

The Code took a step forward by moving away from the concept of binary gender of men and women and recognized the need for equal pay for all genders, by further extending the benefit of the law to other genders, including the transgender people. The Code also makes progress by eliminating Section 16 of the Equal Remuneration Act, 1976, which allowed the government to declare that the factor of pay difference shall be other than sex in any establishment or job. Section 16 essentially gave the government the power to declare the unequal to be equal, without any explanations.

The Indian Supreme Court, in the case of *Air India Etc. Etc vs Nergesh Meerza & Ors* held that a declaration under section 16 was 'presumptive proof' of the fact that there was no gender discrimination under the Equal Remuneration Act 1976 and that such declaration 'completely settles the matter'. The phrase 'same work or work of similar nature' has been interpreted very narrowly by courts and thus leaves many unfilled gaps and loopholes. Operating machines and

taking care of children requires different types of considerable skills, efforts and responsibility, and therefore both types of work deserve decent pay. Yet, courts' vision in terms of possible comparisons has been limited by the phrase "same work or work of a similar nature". The Equality Act of the United Kingdom uses the phrase "work of equal value" instead of "same work".

Equal Remuneration Act 1976 was amended to avoid discrimination in recruitment and the condition of service, apart from pay. This was for the reason being, the Supreme Court in *Air India Etc. Etc vs Nergesh Meerza & Ors* considered that differences in the recruitment process and conditions of service of female air hostesses and male air stewards, evidenced that these were separate classes of employees that could not be compared, even though they performed similar work. The Code focuses only on equal pay, and does not incorporate provisions to prevent discrimination in conditions of service, and thereby downgrades the protection against discrimination offered under the Equal Remuneration Act 1976.

(A) Measures to be taken by the Employer

- Duty of the employer to pay equal wages to men and women workers when the work is of the same character or nature. No employer shall pay any employee employed by him in an organization or a job, compensation and benefits, whether payable in or at rates less favourable than those at which remuneration paid by him to a worker of the opposite sex in that company or a work of the same nature.
- There should be no discrimination on the bases of sex during recruiting.
- Formation of Advisory and check committee at every organization. This organisation will ensure that no gender faces any discrimination of any kind. This committee shall also ensure that the minimum wage limit set by the state and local government is followed rationally in the organisation.
- A government body should be formed to keep a strict review on labour and daily wage organisation and maintain a constant review over such organisations.
- Every employee should be explained his/her rights of getting equal pay for equal work and remedies available if this is not being followed in his/her organisation.

IV. THE LEGISLATIVE RESPONSE TO THE ISSUE

To implement the Constitutional directive under Article 39(d), the Equal Remuneration Act of 1976 (hereafter, ERA Act) was passed, which sought to provide for payment of equal wages and salaries to 'male' and 'female' workers and prevent discrimination based on sex against

women in matters of employment.

Section 2(g)³ of the ERA Act used the term ‘remuneration’ to mean basic wages and salaries including additional emoluments, be it in cash or kind, to a person employed. In Section 5, it specifically prohibits employers from discriminating against women. Further, in the case of *People’s Union for Democratic Rights v. Union of India*⁴, the Supreme Court observed that the principle of equality embodied in Article 14 of the Constitution of India, finds its expression in the provision of the ERA Act.

However, in a report⁵ by the Center for Civil Society, which identifies several links in the chain where the implementation of the ERA Act could break down leading to the non-enforcement of the act, for instance, the flaws in the periodicity and thoroughness of the inspection by labour inspectors.

Recently, in March 2019, the Code of Wages Bill was introduced in Parliament. It has been passed by both the Lok Sabha and the Rajya Sabha. The Bill sets out to replace four statutes, namely, Payment of Wages Act, 1936; Minimum Wages Act, 1948; Payment of Bonus Act, 1965; and Equal Remuneration Act, 1976. The major reasons for introducing such a code involved the concern that statutes such as Payment of Wages Act, 1936 were obsolete in present times, hence it was necessary to update these laws. Secondly, the earlier Acts only covered 40% of the total employment workforce, since the Act provided for only certain salary groups and specific schedules. The new Code will cover all employees and workers in its purview. Thirdly, different legislations provided different definitions of the same words, hence leading to a difficulty for courts to decide the cases, thus, a single code provides for single definitions. Lastly, due to multiple statutes, compliance was difficult at administrative levels as well. Hence, the government introduced the Code of Wages Bill. However, the effectiveness of the bill is subject to future implementation of it.

V. LANDMARK JUDGMENTS

Some of the landmark judgments in the context of equal pay for equal work include:

In the case of *Budhan Choudhary v. the State of Bihar*⁶, the Supreme Court held that the concept of equality does not require that the law treat all individuals the same, but rather classification made between individuals must be reasonable. Hence, the classification must be

³ Section 2(g), ERA.

⁴ People'S Union For Democratic ... vs Union Of India & Others on 18 September, 1982

⁵ Center for Civil Society, Report, <https://ccs.in/equal-remuneration-act>.

⁶ Budhan Choudhry And Other vs The State Of Bihar on 2 December, 1954.

grounded on two rational, firstly, on an intelligible differentia which distinguishes people of one group from other groups, secondly, such differentia must have a rational relation to the object sought to be achieved. Although, the facts of the case itself did not deal with the idea of 'equal pay for equal work', however, the principles laid down have been significantly relied on by the courts in the cases involving such issues.

In the context of the Equal Remuneration Act, 1976, in the case of *Mackinnon Mackenzie and Co. Ltd. v. Audrey D'Costa*⁷, this involved a claim for equal remuneration for female Stenographers and male stenographers. The Supreme Court held that such kind of differentiation is not maintainable, further, the management could not arrive at a settlement, by flouting the express provision of the statute.

In the case of *Randhir Singh vs. Union of India*⁸, the Supreme Court observed that although the principle of 'equal pay for equal work' did not find an explicit place in the fundamental rights, it certainly constitutes a constitutional goal, therefore, it is capable of being enforced through constitutional remedies under Article 32 of the Constitution.

In the case of *V. Markendeya v, State of Andhra Pradesh*⁹, the facts provided that there was a difference in pay scale between graduate supervisors having a degree in engineering and non-graduate supervisors having diploma and license. The Court upheld such difference and stated that the basis of difference being educational qualifications is reasonable for the difference in pay scales, thus would not go against Article 14 and 16.

the landmark case of *State of Punjab and Ors. v. Jagjit Singh and others*¹⁰, the Supreme Court observed that the temporary employees performing similar duties and functions as discharged by permanent employees are to be given wages at par with permanent employees similarly placed. It also stated that this principle must be applied in the cases where the same work is being performed, irrespective of the class of the employee.

VI. CONCLUSION

Despite various efforts by legislatures, executives and judiciaries, the problem of unequal pay for equal work still exists in India. The legislature has enacted various laws to deal with this issue and also decisions of many courts all over India have led to the recognition of equal pay as a fundamental right for equal work. All of these together have led to a considerable

⁷ Mackinnon Mackenzie & Co. Ltd vs Audrey D'Costa & Anr on 26 March, 1987.

⁸ Randhir Singh vs Union Of India & Ors on 22 February, 1982.

⁹ V. Markendeya & Ors vs State Of Andhra Pradesh on 6 April, 1989.

¹⁰ State Of Punjab And Ors vs Jagjit Singh And Ors on 26 October, 2016.

improvement in the situation. There are signs and reports of a decline in gender discrimination in the workplace as employees are now opening up and speaking out for their rights. This is putting the government under enormous pressure to reinforce the laws and order in the workplace.

It is important that measures are continuously taken too aware the labour crowd also of their rights for equal pay. Measures should be taken to form groups which will go in rural areas and introduce the women in these areas that they have the right to get an equal payment, same as the male worker doing the same job as her. They should be introduced with the remedies available under different acts and the institutions they can approach whenever faced with discrimination. Organizations should have an anti-discrimination policy in place, which should outline the commitment of the company towards equality in pay for similar work, and prescribe a mechanism to remedy any complaints to the contrary.
