

Constitutional Prohibition of Sex Discrimination in Employment and Legislative Efforts: Quest for Equality

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The concept of women as a sort of balancing force in the family or national economy has a whole services of practical implications which have the net effect of a permanent part of the workforce and of rendering them particularly susceptible to unscrupulous and discriminatory treatment in the employment markets.² There are many areas of employment in which sex discrimination exists, but our study is mainly concentrated on the socio-legal aspects of sex discrimination in matters of remuneration. In this paper an attempt has been made to examine the constitutional provisions which have a direct bearing upon employment of women and pay parity. The expression sex discrimination in employment is preferred in this paper because the term has become known all over the world during the long struggle of women to achieve equality of remuneration with men. The Equal Remuneration Act, 1976, provides for payment of equal remuneration for men and women workers and prevents the discrimination against women in matters of employment. In this paper we have explored the status of constitutional prohibition of sex discrimination in employment in India. Sex discrimination in employment and wages not only exist in our country but also in other, developed as well as developing countries.

I. Protection of Women under Constitution of India:

Gender discrimination and sexism refers to belief and attitudes in relation to the gender of a person. Such beliefs and attitudes are of a social nature and do not, normally, carry any legal consequences. Sex discrimination, on the other hand, may have legal consequences. The important reasons for this discrimination of women are political disempowerment, economical disempowerment, social prejudices and religious prescriptions.

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² I.L.O.: Women Workers in a Changing World, p. 19.

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The Constitution of India is based upon the edifice of equality. In matters of employment, no discrimination can be made on the basis of sex. In addition, certain directive principles require special efforts for the protection and promotion of women's interest. The Constitution further directs the state to ensure equal pay for equal work to men and women workers. The rights of women under the Constitution have helped to build an illusion of equality, which is frequently used as an argument to resist adoption of protective and acceleratory measures to enable women to achieve their just and equal position in society. In *Government of Andhra Pradesh v. P.B. Vijayakumar*,³ the Supreme Court has held that 'special provisions' for women were introduced in the Constitution to eliminate the socio-economic backwardness of women and to bring about effective equality between men and women. Similar quotas for women in government jobs are not uniformly applied across India. In *Sakamma H.M vs Karnataka Power Transmission Corporation Limited (KPTCL) and Ors.*,⁴ the court said the important reasons for this discrimination of women are political disempowerment, economical disempowerment, social prejudices and religious prescriptions. To end this gender inequality and discrimination our constitutional makers incorporated several provisions in our constitution. The preamble aims at equality of status and opportunity to all Articles 14, 15(1) and (2) and 16(1) and (2) prohibit discrimination against any person only on the ground of sex among other grounds.

The concept of equality has received worldwide recognition in the 20th century. Independence brought the promise of actual liberation and equality. The preamble of the Constitution of India lays down the principles of popular sovereignty, justice, equality, fraternity, liberty and dignity of the individual as the foundation for our constitutional edifices. The Social justice has been promised to women by providing for equal status in society. Political justice is also assured by giving women the right to franchise without any discrimination.⁵ The Indian Constitution in Part III and Part IV deal with Fundamental Rights and Directive Principles of State Policy respectively. Social justice may be defined as the

³ (1995) 4 SCC 520.

⁴ AIR 2012 (2) Kar. 81.

⁵ Art. 12 defines State : "... unless the Government and Parliament of India and the Government and the Legislature of each the States and all local and other authorities within the territory of India or under the control of the Government of India."

right of weak, aged, destitute, poor, women, disabled, children and other under privileged persons to the protection of the State against the ruthless competition of life. It also means the removal of inequalities.⁶ In *C. Ramesh & Ors. vs State of Karnataka & Anr.*,⁷ the court held that the Articles 14, 15, 16, 19, 21 and 39 of the Constitution of India by applying the present social norms, developments in the society, international conventions and a host of legislations providing for upholding of human dignity, removing gender based discrimination and exploitation and like laws and if so tested fails the test of being a valid law and particularly in the wake of the law.

II. Fundamental Rights and Sex Discrimination:

Article 14 guarantees equality before law and equal protection of law to any person in India. So the discrimination on the basis of sex is permissible when it is reasonable.⁸ As sex discrimination is specially dealt with under Articles 15 and 16, the cases involving sex discrimination have not arisen under this Article,⁹ Article 15 (3) empowers the State to make ‘any special provision for women and children’, even in violation of the fundamental obligation of non-discrimination. So this provision may be described as “protective discrimination” for women.¹⁰ Article 16(1) of the Constitution of India guarantees to all its citizen equality of opportunity in matters relating to employment or appointment to any office under the state. Article 16(2) protects citizens against discrimination in respect of any employment or office under the state on grounds only of religion, race, caste, sex, descent.¹¹ Therefore, the provisions upholding that a man is punished for adultery but not a women was regarded as not being discriminatory.¹²

*In Walter Alfred Baid v. Union of India.*¹³ The Court held that equality of opportunity in public employment and the corresponding prohibition against discrimination is absolute in nature, and that Article 16, unlike Article 15 did not permit an exception. Article 16 guarantees to every citizen equal opportunity in matters relating government

⁶ K. Subbarao – Social Justice and Law (1947) p. 2.

⁷ AIR 2009 (1) Kar 50.

⁸ For a detailed discussion of test of reasonableness of classification, See D.D. Basu – *Commentary on the Constitution of India* (Sixth Edn.) Vol. 8 at p. 170.

⁹ P. Andiappan, “Public Policy and Sex Discrimination in Employment in India” *14 IJIR* 395 at p. 396.

¹⁰ M. Hidayatullah, - *Constitution Law of India*, (1984), (Prof. Ram Rajput) at p. 274.

¹¹ *State Bank of India & Anr. vs Somvir Singh*, 2007 AIR SCW 1571

¹² *Yusuf Abdul Aziz v. State of Bombay*, AIR 1954 S.C. 321.

¹³ AIR, 1976 Delhi 302. See also *Shamsher Singh Hukum Singh v. State of Punjab*, AIR 1972 P&H 177; *Radha Charan Patnaik v. State of Orrisa*, AIR 1975 Orrisa 237; *State of Kerala v. K. Kunhipacky*, AIR 1955 Ker. 108.

employments¹⁴ and it reinforces this idea when it states that a citizen shall not be ineligible for or discriminated against in Government employment because of religion, race, caste, sex, decent, place of birth or residence.¹⁵ This equality is limited to public employment. The discrimination by the Government as well as private employer, on the basis of sex, is prohibited by the Equal Remuneration Act, 1976 and that too only against women.

Sex is a bound classification and although there can be no discrimination in general on the ground; the Constitution provides for special provision in the case of women and children.¹⁶ In *C.B. Muthamma v. Union of India*.¹⁷ Justice V.R. Krishna Iyer said that, this misogynous posture is a hangover of the masculine culture of manacling the weaker sex forgetting how our struggle for national freedom was also a battle against women's.¹⁸ He further observed that, we do not mean to universalise or domatise that men and women are equal in all occupations and all situations and do not exclude the need to pragmatise where the requirements of particular employment, the sensitivities of sex or the peculiarities of societal sectors or the handicaps of either sex may compel selectivity. But save where the differentiation is demonstrable. The rule of equality must govern.¹⁹

A landmark judgment in *Air India v. Nergesh Meerza*,²⁰ the Supreme Court held that regulations put in place by a state-run aviation company in India which provided for the retirement of air hostesses on their first pregnancy, and the provision for extension of services of air hostesses beyond 35 years and up to the age of 45 years at the sole discretion of the managing director were arbitrary and violated the right to equality. The classification of women air hostesses and male pursers was sufficient for the court to uphold that there was no discrimination on the grounds of sex alone, which is the requirement of article 15 (1) of the Constitution. Yet, the Court upheld the lower retirement age for air hostesses compared to (male) flight pursers on the ground that this was not discrimination based *solely* on sex, as they belonged to different cadres and their service conditions were different. Some public sector employees in India have restrictions upon newly recruited pregnant women joining duties. This has been widely protested and challenged in courts as discriminatory, following

¹⁴ Article 16 (1).

¹⁵ Article 16 (2).

¹⁶ *Yusuf Abdul v. State of Bombay*, AIR,S.C. 321.

¹⁷ AIR 1979 S.C. 1868.

¹⁸ *Id.* at p. 1870.

¹⁹ *Id.*

²⁰ AIR 1981 S.C. 1829.

which undergoing pregnancy tests or asking details of menstrual history have been struck down by the courts.²¹ The judicial approach has been in the direction of expanding the scope of women's employment, while at the same time ensuring safe conditions for women at their workplace. The right to have a work environment free from sexual harassment, and the duty cast upon the employer to ensure such a non-hostile work environment, is a result of court decisions in India.²²

The right to equality is a fundamental right and discrimination 'on grounds only of sex' is against such fundamental right, opportunities for men and women for employment, remuneration, health etc.²³ Articles 13, 14, 15, 16 of the Constitution of India and other related articles prohibit discrimination on the ground of sex. Social and economic democracy is the cornerstone for success of political democracy. The scheduled castes, scheduled tribes and women, from time immemorial, suffered discrimination and social inequalities and made them accept their ascribed social status.²⁴ In *Anju Garg & Ors. vs Hotel Association of India & Ors.*,²⁵ the Apex Court said that the fundamental rights of working women under Articles 14, 19 and 21 of the Constitution of India with the aim of finding suitable methods for realization of the true concept of "gender equality"; and preventing sexual harassment of working women. Court also said sex classifications may be used to compensate women "for particular economic disabilities [they have] suffered," to "promote equal employment opportunity," to advance full development of the talent and capacities of our nation's people.

III. Fundamental Right and Equal Pay of Equal Works:

One of the important directives is contained in Article 39(d) of the Constitution which proclaims 'equal pay for equal work for men and women' as a constitutional goal. In *Randhir Singh v. Union of India*²⁶ the Supreme Court observed that, it is true that the principle of 'equal pay for equal work' is not expressly declared by our Constitution to be a constitutional rights. But it certainly is a constitutional goal ... Construing Article 14 and 16 in the light of the Preamble and Article 39(d), we are of the view that the principle 'equal pay

²¹ *Mrs. Neera Mathur v. Lige Insurance Corporation of India and Anr.*, AIR 1991 S.C.392.

²² *Vishaka v. State of Rajasthan*, AIR 1997 S.C. 3011.

²³ *Siniya Mol. C.S. & Ors. vs K.S.E.B. Rep. by the Secretary & Anr.* 2007 Lab. I. C. 1153.

²⁴ *Narayan Soren & Ors. vs Ranjan Murmu & Ors.* AIR 2009 Jh. 23.

²⁵ AIR 2007 SCW 7772.

²⁶ (1982) 1 SCC 618.

for equal work' is deductible from these Articles and may be properly applied to the cases of unequal scales of pay based on no classification or irrational classification though those drawing the different scales of pay to identical work under the same employee.²⁷ In *Kishori Mohanlal Bakshi v. Union of India*²⁸ the Supreme Court that 'equal pay for equal work' is not a mere demagogic slogan. It is a constitutional goal capable of attainment through constitutional remedies, by the enforcement of constitutional rights.²⁹

The principle of 'equal pay for equal work' is not expressly declared by our constitution to be a fundamental right. But it certainly is a constitutional goal. Art. 39(d), of the constitution proclaims "equal pay for equal work for both men and women" as a directive principle of state policy.³⁰ In *Surinder Singh v. Engineer-in-Chief, C.P.W.D.*,³¹ the Supreme Court observed that the Central Government, the State Government and likewise, all the public sector undertaking are expected to function like model and enlightened employers and arguments such as those which were advanced before us that the principle of equal pay for equal work in a court of law should ill come from the mouths of the State of State undertakings. In *Dhirendra Chamoli v. State of U.P.*³² P.N. Bhagwati C.J. observed that this argument lies ill in the mouth of the Central Government for it is an all too familiar argument with the exploiting class and welfare state committee to a socialist pattern of society cannot be remembered that in this country where there is so much unemployment, the choice for the majority of people is to starve or to take employment on whatever exploitation terms offered by the employer.³³

The nature and functions and the work of two persons are not shown to be dissimilar to the fact that the recruitment was made in one way or the other would hardly be relevant from point of view of "equal pay for equal work."³⁴ In *Ashoka Kumar Thakur vs Union of India & Ors.*,³⁵ the Supreme Court said equality has also been enshrined in various international instruments, such as the 1948 Universal Declaration of Human Rights. Its

²⁷ *Id.* at pp. 623-24.

²⁸ AIR 1952 S.C. 1132.

²⁹ *Id.* at p. 619.

³⁰ *Randhir Singh vs. Union of India*, AIR 1982 S.C. 879, *the Jharkhand Rajya Bhu-Map and Bandobast Arajpatrit Karmachari Sangh vs The State of Jharkhand & Ors.* AIR2007 (1) Jhar. 281 & *Moirangthem Medhabati Devi & Anr. vs State of Manipur & Ors.* 2008 LAB. I. C. (NOC) 187 (GAU.)

³¹ (1986) 1 SCC 639..

³² (1986) 1 SCC 637.

³³ *Id.* art p. 638.

³⁴ *Bhagwandas v. State of Haryana*, AIR 1987 S.C. 2049. See also *Jaipal v. State of Haryana* AIR 1988 S.C. 1505 and *Telecommunication Research Centre Scientific Officers (Class I) Asstt. V. Union of India* (1987) 1 SCC 582.

³⁵ AIR 2008 SCW 2899.

preamble speaks of “the equal and inalienable rights of all members of the human family”, and of “the equal rights of men and women.” Reservation is one of the many tools that are used to preserve and promote the essence of equality, so that disadvantaged groups can be brought to the forefront of civil life. In *C. Ramesh & Ors. vs State of Karnataka & Anr.*,³⁶ the court held that the state, instead of endeavouring to achieve the equal opportunities to men and women to provide a right to an adequate means to livelihood, on the other hand positively deprives the female section of the society an equal opportunity even where it was available.

Equal pay for equal work for men and women is a vital question of great concern to the workers all over the world. In the preceding chapters it has been considered in historical perspective and in relation to national and international efforts. What extent has the Equal Remuneration Act, 1976 been able to achieve its cherished goal of pay parity? On certain grounds including sex, is already prohibited by the Constitution under Article 14 and 16 read with Article 39(d). There is hardly any instance of sex-based discriminations in remuneration in Government employment. A small area is, however, left in respect of which the Central Labour Department has to ensure the equal remuneration. It is to ensure the observance of principle of ‘equal pay for equal work for men and women workers’ wherever the private contractors are entrusted with some work under the authority of the Central Government, a railway administration, banks, etc.

IV. Women and Directive Principles:

The Directive Principles of State Policy enunciated in Part IV of the Constitution embody the major policy goals of a welfare state. The provisions of Article 39(a) right to an adequate means of livelihood for men and women equality; Article 39(d) equal pay for equal work; for both men and women; Article 39(e) protection of health from abuse and entry into avocations unsuited to their age and strength; and Article 42 just and human conditions of work and maternity relief.³⁷ If there is an obligation upon the state to secure to the citizens an adequate means of livelihood and the right to work, it would be sheer pedantry to exclude the right to livelihood from the content of the right to life. The state may not, by affirmative

³⁶ AIR 2009 (1) Kar. 50.

³⁷ Prof. Upendra Baxi, “Constitutional Provisions Relating to Status of Women – An Analytical Examination,” paper prepared for the Committee on Status of women in India – See the Report at p. 2.

action, be compellable to provide adequate means of livelihood or work to the citizens.³⁸ Therefore the allotment of land to the landless persons is a step by the government to provide them right to life which includes right to livelihood and the aforesaid constitutional goal also can not remain mere empty formality.³⁹

To promote the welfare of the people by securing and protecting as effectively as it may a social order in which social justice shall inform all the institutions of the national life'. Article 39 which inter alia obliges the state to direct its policy towards securing that the citizens, men and women equally have the right to an adequate means of livelihood, the ownership and control of the material resources of the community are so distributed as best to subserve the common good, the operation of the economic system does not result in the concentration of wealth.⁴⁰ In *Narmada Bachao Andolan vs State of Madhya Pradesh & Anr.*,⁴¹ the Supreme court said principle of socio-economic justice which every state is under an obligation to fulfill, in view of the provisions contained in Articles 37, 38, 39(a), (b), (e), (f), 41, 43, 46 and 47 of the Constitution of India.

V. Women and the Equal Remuneration Act:

The Equal Remuneration Act, 1976 is opportune time to assess the governmental efforts made under the Act to eliminate sex discrimination in employment and wages. To what extent has the Act has been able to achieve its cherished goal? Whether the Act has been able to improve the representation of women in work force? What are main hurdles in the way of achieving pay parity? The highest concentration of women workers is in unorganized sectors of industry and agriculture. It is the female workforce of this sector which face maximum discrimination in respect of wages. It is denied the protection of labour legislations as their employers are for all practical purposes outside the reach of most laws. The unorganised nature of industry, casual nature of jobs and lack of labour organisations are main factors responsible for the low status of working women in this sector. In *U. P. State Sugar Corpn. Ltd. & Anr. vs Sant Raj Singh & Ors.*,⁴² the Supreme Court said the doctrine

³⁸ *Mohd. Riyaz Khan & Ors. vs State of Chhattisgarh & Ors.*, 2008 CRI. L. J. 3453.

³⁹ *Ekta Parishad (N.G.O.) Gwalior & Ors. vs M. P. State & Ors.* AIR 2008 (NOC) 1981.

⁴⁰ *The General Secretary, Mysore Division Industrial Workers General Union, Mysore vs The Deputy Commissioner, Mysore & Ors.*, AIR 2010 (2) Kar R 540.

⁴¹ AIR 2011 SCW 3337.

⁴² AIR 2006 SC 2296.

of equal pay for equal work, as adumbrated under article 39(d) of the Constitution of India read with Article 14 thereof, cannot be applied in a vacuum. The constitutional scheme postulates equal pay for equal work for those who are equally placed in all respects. Possession of a higher qualification has all along been treated by this court to be a valid basis for classification of two categories of employees.

The Equal Remuneration Act in 1976 to provide for payment of equal remuneration for men and women workers and prevent the discrimination against women in matters of employment. The right of “equal pay for equal work” has been declared by the Supreme Court as a fundamental right in *Randhir Singh v. Union of India*.⁴³ Accordingly the State as an employer is bound to pay equal remuneration to all workers performing same or broadly similar nature of work. Judicial activism in the area of pay parity for the first time appeared in *Randhir Singh v. Union of India*⁴⁴ where the Supreme Court read an important directive contained in Article 39(d) with fundamental right of equality contained in Articles 14 and 16 and exalted the doctrine of ‘equal pay for equal work’ to the position of a fundamental right. In *Air India Cabin Crew Association vs Yeshawinee Merchant and others*,⁴⁵ the Supreme Court held that the ground of alternative jobs is also discriminatory treatment to them on sex which violates Section 5 of the Equal Remuneration Act. The age of retirement from flying duties of air hostesses at the age of 50 years with option to them to accept post for ground duties after 50 and up to the age of 58 years is discrimination against them based on sex which is violative of Articles 14, 15 and 16 of the Constitution of India.

VI. Concluding Remarks:

A developing country like India, the real question as to sex discrimination is women’s status generally and is in regard to employment. The ILO Convention on Equal Remuneration, Article 38, 39(a), (b), (e), (f), 41, 43 and 46 of the Constitution of India and the Equal Remuneration Act, 1976 the main object of these Act is to provide for the payment of equal remuneration to men and women in matters of employment and the prevention of discrimination on the ground of sex. In India, the Constitution is based upon the edifice of equality. In matters of employment under the State, no discrimination can be made on the basis of sex. In addition, certain directive principles require special efforts for the protection

⁴³ Supra Note 30.

⁴⁴ Id.

⁴⁵ AIR 2004 SC 187.

and promotion of women's interest. The Constitution further directs the state to ensure equal pay for equal work to men and women workers. The rights of women under the Constitution have helped to build an illusion of equality, which is frequently used as an argument to resist adoption of protective and acceleratory measures to enable women to achieve their just and equal position in society.

Women, during the last few decades, have been moving from agriculture into industries and services where they now constitute a conspicuous portion of labour force. So there appears to be need for positive measures aimed at widening women's educational, employment and promotional opportunities, raising the work qualifications and improving their relative position in employment market.