

The IUP Law Review

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Right to Equal Pay for Equal Work: A Critical Analysis of the Plight of Women Working in the Construction Industry of India

Revati Naik*

Economic empowerment of women is a means to realization of their rights and national development. In India, after agriculture, the construction sector is one of the largest contributors to economic activity and 30% of the construction workers are women. Compared to their male counterparts, women in the construction sector are often denied the right to equal pay for equal work. This discrimination is due to the interplay of various factors such as nature of work, gender stereotypes, perception about construction as a male-oriented industry and engagement of women as unorganized workers. In India, the mandate to pay parity is guaranteed by the Constitution and the Equal Remuneration Act, 1976. The enforcement of right to equal pay is hampered by various lacunae prevailing in the substantive law as well as problems faced in implementation. This paper is an attempt to understand the discrimination regarding payment of wages faced by women in the construction industry, find out the causes of it and make concrete recommendation to deal with it.

Introduction

The economic development of a country depends upon the development of its citizens, which is achieved through their participation in work. The involvement of both men and women in productive work is a prerequisite of a developed nation. In addition to contributing to the economic growth of the country, employment of women leads to their empowerment, which itself is a multifaceted concept. It is recognized that economic empowerment of women is essential for realizing their rights and liberation and also to achieve broader goals such as national development, economic growth, poverty eradication, health, etc. Women who are economically empowered contribute more to their families, societies and national economy, and in turn contribute to sustainable development. However, the journey of women to become economically empowered is not easy. It is full of obstacles such as gender bias and discrimination. Women suffer gender discrimination in terms of the jobs available to them, their remuneration, benefits

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and working conditions, and access to decision-making positions.¹ According to World Economic Forum's Global Gender Gap Report 2021, India ranks 140th among 156 countries and is the third worst performer in South Asia. Noting the decline of women's labor force participation rate from 24.8% to 22.3%, the report highlights that the estimated earned income of women in India is only one-fifth of men's. As per the report, India has closed 62.5% of its gender gap, but the gender gap on economic participation and opportunity subindex widened by 3% this year.²

The consistent increase in women literacy, both in urban and rural areas, has not translated into increase in the number of women with effective employment due to various sociocultural reasons.³ This is more so in the case of construction industry which is essentially perceived as a male-dominated sector. India's construction industry is characterized by dualistic structure, i.e., prevalence of organized sector which coexists with a large unorganized sector. In India, construction sector is one of the largest contributors to economic activity, after agriculture, and women form an integral part of it. As per Census 2011, the total number of female workers in India is 149.8 million and females in urban area are 28 million. Out of 149.8 million workers, 43.7 million are engaged in industry other than agriculture and household industry. However, a majority of women working in the construction sector are working as unorganized workers.⁴ In India, it is estimated that up to 30% of construction workers are women.⁵ The involvement of women in construction industry is observed at three different levels: firstly, women in technical positions such as engineers and architects; secondly, women in administrative positions like managers (Finance and HR); and thirdly, women as construction laborers. The number of women engaged in the third category is comparatively more than the first two. India's contribution of women as technical officers is only about 1.4%, i.e., about 0.12 million out of 8.2 million women of total 3.6 million of construction workers.⁶ A 2009 International Trade Union Confederation (ITUC) report for 20 countries (including India) has detected an average gender pay gap of 22.4% and a median gap of 20.4%.⁷

India's construction sector is an important growth driver of India's economy. It contributes around 8% to India's GDP. Its glaring existence can be found in urban India. However, the overall participation of women in construction sector is less, and

¹ International Labor Conference, Global Report Under the Follow Up to the ILO Declaration on Fundamental Principles and Rights at Work, "Equality at Work: The Continuing Challenge", (2011).

² The World Economic Forum (2021), "Global Gender Gap Report 2021", March.

³ Tanushree Chandra (2019), "Literacy in India: The Gender and Age Dimension", Observer Research Foundation Issue Brief No. 322.

⁴ Kalpana Devi and U V Kiran (2013), "Status of Female Workers in Construction Industry in India: A Review", *IOSR Journal of Humanities and Social Science*, Vol. 14, No. 4, pp 27-30.

⁵ Reshma Patel and Jayeshkumar Pitodra (2016), "The Role of Women in Construction Industry: An Indian Perspective", Special Issue for ICWSTCSC-2016, *Indian Journal of Technical Education*.

⁶ *Ibid.*

⁷ International Trade Union Confederation (2009), "Report on Gender (In)equality in the Labor Market", March.

it is attributed to internal factors such as attitude of women about the profession or the general perception about the construction sector, and external factors such as difficulty in maintaining the work-life balance, non-family friendly working hours, lack of good recruitment policies, lack of good gender policies, etc.⁸ Further, those women who work in the construction sector are generally paid less income compared to their male counterpart. The discrimination prevailing in construction sector specifically with respect to payment is due to interplay of various factors. This paper is an attempt to understand the discrimination regarding payment of wages faced by women in construction industry, to find out the causes of it and make concrete recommendation to deal with it.

Legislative Framework Pertaining to Right to Equal Pay for Equal Work

Recognition to the right to equal pay for equal work can be found in various international instruments such as Universal Declaration of Human Rights, 1948, International Covenant on Economic, Social and Cultural Rights and Convention on Elimination of All Forms of Discrimination Against Women, International Labor Organization's Equal Remuneration Convention 1951 (No. 100) and Convention on Discrimination (Employment and Occupation), 1958 (No. 111). India is a founding member of ILO and signatory to these instruments and therefore owes obligation to give effect to principle of equal remuneration through its domestic law.

In India, the mandate governing the gender pay parity is guaranteed by the Constitution.⁹ According to Directive Principles of State Policy, the state has to ensure that there is equal pay for both men and women.¹⁰ Apart from this, the Supreme Court has extracted the general principle of equal pay for equal work by reading the Articles 14, 16 and 39(d) together.¹¹

The Indian law has witnessed the evolution of the right to pay parity from the abstract doctrine unconnected with the concept of equality¹² to the constitutional goal capable of achievement by means of constitutional rights and enforcement of constitutional rights.¹³ The constitutional courts on various occasions have pronounced upon various facets of the right to equal payment¹⁴ and permitted reasonable restrictions on it.¹⁵ Even though equal pay for equal work has not been expressly declared as a fundamental right, it definitely constitutes a constitutional goal, enjoining the state not to deny any person equality before law in matters relating to employment including the scales of pay.¹⁶

⁸ B Durga Devi and S Anthony Golden (2020), "Challenges Faced by Women Engineering Graduates in Construction Industry", *International Journal of Disaster Recovery and Business Continuity*, Vol. 11, No. 1, pp. 3182-3190.

⁹ The Constitution of India, Article 3.

¹⁰ The Constitution of India, Article 39(D).

¹¹ *Randhir Singh vs. Union of India*, 1 (1982), 1 SCC 618.

¹² *Kishori Moharlal Bakshi vs. Union of India*, A.I.R. 1962 S.C. 1139.

¹³ *Randhir Singh vs. Union of India*, 1 (1982) 1 SCC 618.

¹⁴ *Mackinnon Mackenzie vs. Audrey D Costa*, (1987) 2 SCC 469.

¹⁵ *State of Punjab vs. Surjit Singh* 2009 AIR SCW 6759.

¹⁶ *Mewa Ram Kanojia vs. A.I.J.M.S.* (1989) 2 SCC 235, *Randhir Singh vs. Union of India* 1982 SCR (3) 298.

Long back in 1987, while dealing with the matter where the employees of the same employer doing same work of same nature discharged in the same department but appointed on a temporary basis instead of in a regular cadre on regular basis, the Apex court observed that the mode of recruitment of petitioners being different from others was immaterial from the point of view of doctrine of equal pay for equal work and temporary appointment cannot be the basis for denial of pay equality.¹⁷ In a number of judgments, right to equal pay for equal work is extended to the temporary employees, including daily wage employees, ad hoc appointees, employees appointed on casual basis, contractual employees and the like. The right of women to receive equal pay like that of their male counterparts has been affirmed in many pronouncements. In *Mackinnon Mackenzie and Co. Ltd vs. Audrey D'Costa*, the Apex court held that men and women performing same or similar work are entitled to equal payment and there should not be any discrimination regarding this. Any such discrimination was held to be violative of Article 14 and Article 16 of the Constitution of India.¹⁸

However, the statutory and constitutional guarantee of gender pay parity has not been transformed in reality in many sectors. The enforcement of right becomes even more difficult in construction sector due to its peculiar feature such as nature of work, gender stereotypes and perception about construction as a male-oriented industry and engagement of women as unorganized workers in the industry. The present research on women working in construction sector reveals prevailing discrimination in the payment of remuneration. The research conducted by V. V. Giri National Labour Institute as to the implementation of the Equal Remuneration Act reveals that in construction industry women are generally working as unorganized workers and receive less payment than their male counterparts. The research also confirms the unawareness on the part of women as to the right to equal pay and inability to seek remedy for its violation.¹⁹ Further, the research as to the status of women in construction industry highlights the gender bias prevailing in the sector which vitiates the equality of status resulting in denial of social justice to women. It is observed that in construction industry, fixation of wages by the government for both skilled and unskilled labor for public and private sector is seldom respected as the industry works in the form of a contract which enables the contractor to negotiate the wages. This peculiar feature in turn gives upper hand to males with respect to wage negotiation. The research affirms that the female gets 20% less wages than the male engaged in the same work.²⁰ The pay disparity is considered as the outcome of two reasons, i.e., discrimination per se and occupational choice of women into lower paying jobs. In India, for the last 25 years the labor force participation rate among women has stuck to average 23%.²¹

¹⁷ *Bhagwan Dass vs. State of Haryana* AIR1987 SC 2049.

¹⁸ AIR 1987 SC 1281.

¹⁹ Implementation of Equal Remuneration Act, 1976, V. V. Giri National Labour Institute.

²⁰ *Supra* note 4.

²¹ Surjit S Bhalla and Ravinder Kaur (2011), "Labour Force Participation of Women in India: Some Facts, Some Queries", Working Paper 40, London School of Economics and Political Science, Asian Research Center, London.

For regulating employment and conditions of service of workers engaged in the construction sector and more specifically to provide safety, health and welfare measures for them, the Central Government has enacted the Building and Other Construction Workers (Regulation of Employment and Condition of Service) Act, 1996. In pursuance with the provisions of this Act, the state governments have established Building and Other Construction Worker's Welfare Board. Through this board, various welfare measures such as immediate assistance in case of accident, pensions, and group insurance scheme, financial assistance for the education of children, etc. have been introduced. However, the number of workers who have actually availed the benefit is very less.

To implement the constitutional direction as to pay parity, the Equal Remuneration Act, 1976 (hereinafter the ER Act) was enacted to provide payment of equal remuneration to men and women workers for same work or work of similar nature²² and prevention of discrimination against women in the matters of employment.²³ Further, it prohibits discrimination against women in recruitment and service conditions, except where the employment of women is prohibited or restricted by or under the law. The Act applies virtually to every kind of employment and covers all industries and sectors, public and private, organized and unorganized, and all employees doing permanent, temporary and casual work. The Act has imposed a positive duty on the employer to ensure payment of equal remuneration to the employees, both male and female, working in such establishment for performing same work or work of similar nature. For the purpose of deciding whether the work is same or of similar nature, certain considerations have been laid down by the court. The court observed that while deciding whether the work performed by two employees or classes of employees is same or of similar nature, the Authority is expected to take a broad view, and where the work performed differs, the Authority should take the broad approach in deciding whether the differences are of practical importance so as to ensure that claim of equity is not defeated on trivial grounds. In making comparison, the Authority should take into consideration duties generally performed by men and women, applying the criteria of actual performance and not that of the theoretical possibility.²⁴ It was further made clear that gender pay disparity arises only in cases where the men and women doing the same or similar kind of work are paid differently.

For increasing the employment opportunities for women, the Act provides for the constitution of Advisory boards with half of women members. It has casted a duty on the employer to maintain registers and other documents in relation to the workers employed by him²⁵ and failure to maintain it is penalized with imprisonment, which may extend to one month and fine up to ₹10,000.²⁶ Payment of remuneration at unequal

²² The Equal Remuneration Act, 1976 (Act 25 of 1976), Section 4.

²³ *Ibid.*, Section 5.

²⁴ *Supra* note 12.

²⁵ *Supra* note 20, Section 8.

²⁶ *Supra* note 20, Section 10.

rates to men and women for the same work or work of similar nature is made punishable with fine up to ₹25,000 and imprisonment, which may extend to one year but not less than three months. The Act provides that the complaint regarding non-payment of wages at equal rates can be made by the worker, legal practitioner on behalf of the worker, official of trade union, inspector appointed under the Act or any person with authority.

With the objective of streamlining a vast number of labor laws and to simplify the mechanism under it, the government has proposed to subsume the now existing laws into five broad codes including the wage code. The Code of Wages (hereinafter Wage Code) provides for amalgamation of four wage-related laws including the ER Act. It has received the presidential assent but has not yet been enforced. It provides for the repeal of the Act and has provided for the substantial changes in the law regarding the equality of remuneration. The Labor Wage Code has provided for some significant changes in the labor laws which are likely to have far-reaching effect such as changed definition of wages and workers and changes with respect to hiring of employees through the third party contractors, etc.

Even though construction sector is a blend of organized and unorganized workforce, the number of women working in organized sector is less than those working in unorganized sector. In the unorganized part of the construction sector, wages less than minimum wages are paid. A majority of the labor force working in the construction sector enter by way of contractual engagement which often offers the opportunity to the contractor to negotiate the wages.²⁷ Women working in unorganized sector can seldom raise their voice against the contractors due to the lack of bargaining power. The system of contractor and sub-contractor enables the employer to evade all the responsibility with respect to the employees.

Challenges to the Enforcement of Women's Right to Equal Pay for Equal Work in the Construction Sector

1. **Lacunae prevailing in the legislative framework pertaining to right of equal pay to equal work:** The legislative framework pertaining to gender pay parity governing women workers in construction sector, specifically in unorganized sector, is inadequate from two perspectives: firstly, inadequacy exists at the level of substantive law; and secondly, ineffective implementation of these laws wipes out the legislative endeavor to make equality a reality. Statutory guarantee of equal pay for equal work in the form of Equal Remuneration Act, 1976 has certain inherent drawbacks which are as follows:
 - a. **Non-registration of women workers working on contractual or temporary basis:** In spite of its vast applicability, in reality the women engaged in the construction on contractual, casual or temporary basis

²⁷ *Supra* note 4.

are excluded from the application of the Act. The absence of the mechanism of its enforcement in respect of unorganized laborers makes this Act a daydream. Even though under the Wage Code, the contractor (or sub-contractor), who either undertakes to produce a given result for the establishment or supplies contract labor for any work of the establishment, is included in the definition of the term 'employer', it does not provide a clear mechanism for enforcement of liability on the contractor/employer with respect to those working on temporary or contractual appointments.

Even though the Code has provided for digital payment, the provision of compulsory registration along with the payment made, which would have brought transparency in the governance, is not given any attention.

- b. **Inability to inspect the registers due to less number of labor inspectors who are overburdened:** Presently, the labor inspectors who perform the work of inspection of registers required to maintain under the ER Act are less in number and are overburdened as they have to perform various other functions under other labor laws. To address this problem, the Wage Code has provided for digital inspections wherever possible, but the Code has missed the opportunity of making the digital registration of workers. The possibility of using the artificial intelligence to track the violation of right to equal payment is not addressed at all by present legislation as well as the Code.
- c. **No provision for unanimous complaint:** Further, as to evoking the remedial mechanism, both ER Act and the Code allow only the worker, legal practitioner on behalf of the worker, official of the trade union, inspector appointed under the Act or any person with authority to complain regarding the violations. It does not allow unanimous complaints. The threat of losing the job many times deters the worker from reporting the violations.
- d. **Lack of deterrence of penalties and punishments:** Another significant loophole prevailing under the ER Act is that the punishments prescribed for violation have no deterrent effect at all. This is true in the case of Wage Code, where securing compliance is the objective and not penalization. Many of the offenses under the Wage Code are compoundable. It has prescribed comparatively heavy amount as fine but no imprisonment is prescribed for the first-time offenders. In case commission of the offense for the second time, imprisonment only up to three months is provided. Such a lenient approach with respect to violations will certainly make the Code a toothless tiger and will allow the governmental policy to override the constitutional guarantee.

In addition to the above-mentioned lacunae in the legislative framework, there are certain challenges faced in the effective implementation of the Act and exercise of the right to pay parity such as:

- a. **Socio-cultural aspects and discrimination affecting the enforcement of right to equal pay:** The construction sector is perceived as a male-dominated sector. The gender bias and the social forces which have perpetuated the belief that women are inferior workers operate as a barrier in the journey of women worker from unskilled to skilled worker in spite of possessing the necessary skills and capabilities.²⁸ Women enter the employment as unskilled worker and retain that status till the end of the employment, which poses a significant challenge to the process of economic empowerment.
- b. **Unawareness about the right:** Unawareness about the right is the basic obstacle faced in effective implementation of the right. The unawareness about the recognition of the right and machinery of its enforcement can be attributed to various causes such as illiteracy, large population, lack of bargaining capacity or being in unorganized sector. There is a dire need to sensitize people, specifically women employees and employers, about the right to pay parity.
- c. **Underreporting of violations:** Firstly, the number of complaints regarding the violations is very less. Inspections are made seldom and actions are taken very rarely. There are various social aspects which influence the enforcement of right to equal pay.
- d. **Intersectionality of discrimination against women affecting the enforcement of right to equal pay for equal work:** Further the intersectionality of discrimination has a significant impact on the enforcement of right of equal pay for equal work. Women are facing multiple discriminations; e.g., a dalit women working in unorganized construction sector or a migrant woman who is a dalit working in unorganized construction sector will face multiple and peculiar challenges with respect to right of equal pay for equal work.²⁹ The present law does not take into consideration this aspect while recognizing rights and providing various social security measures. The lockdown, induced as a result of the Covid-19 pandemic, has underlined the vulnerability of labor class, specifically migrant workers. The vulnerability, which results in less bargaining power, poses a significant challenge to the enforcement of right to pay parity.

²⁸ Annette Barnabas, D Joseph Anbarasu and S Clifford Paul (2009), "A Study of Empowerment of Women Construction Workers as Masons in Tamilnadu, India, *Journal of International Women Studies*, Vol. 11, No. 2, p. 121.

²⁹ S Thorat, P Attewell and F F Rizvi (2009), "Urban Labour Market Discrimination", Working Paper Series, Indian Institute of Dalit Studies,

Conclusion

The analysis of the provisions and implementation of ER Act reveals that the lacunae prevailing in the legal framework dealing with right to equal pay for equal work are positively associated with ineffective implementation of right to pay parity for women working in construction industry, and the social reality of Indian society adversely affects the enforcement of this right. Various lacunae existing in the system and challenges to the effective exercise of the right need to be dealt with through a multipronged policy, providing a robust mechanism for redressal with sufficient number of officers to execute it, effective use of technology for detecting the violation or conducting inspections, etc. The use of artificial intelligence can also help in the registration of employees, wages paid to them, and detecting and punishing the violations. The provision for anonymous complaints regarding the violation can make effective exercise of this right a possibility.

Presently, the Central Government has rolled out the national database for unorganized workers with the objective of securing the welfare of a large number of persons working in the unorganized sector. More than three crore unorganized laborers from various sectors, including construction, have got themselves registered through this e-shram portal. It intends to create a database which will be instrumental in the delivery of various benefits under social security schemes and governmental policies directly to the account of the registered worker.³⁰ The scheme will serve twofold objectives: firstly, it will create an online database of unorganized laborers which will form the basis of various policies regarding them; and secondly, it will make it possible for the government to reach out to these people in case of emergency. This initiative is an example of the governmental will to redress the grievances of the working class. Focused governmental efforts, coupled with political will, can definitely bring about change with respect to the exercise of right to equality guaranteed in the constitution. ♦

Reference # 73J-2021-10-04-01

³⁰ Ministry of Labor and Employment, Government of India, e-Shram, National Database of Unorganized Workers, available at <https://eshram.gov.in/home>

Socioeconomic Rights: From Aspirations to Justiciable Rights

Mallika Ramachandran*

Ensuring economic, social, and cultural rights is significant for a life with dignity as not only are they concerned with basic needs (among others), but also important in the effective realization of civil and political rights. In fact, as has often been reiterated, all human rights are interdependent, interrelated, and indivisible. The importance of socioeconomic rights has always been recognized, though in historical times, these were treated in terms of welfare by the state or charity by individuals. These rights were also recognized as part of the modern human rights regime established as a response to the atrocities of World War II, but were marginalized and inadequately protected thereafter. However, a number of steps taken, particularly from the mid-1980s onwards, have brought the focus again on to these rights and played a role towards bringing them in line with the protection given to civil and political rights. This paper seeks to explore the history and development of socioeconomic rights. It considers their status prior to the adoption of the Universal Declaration of Human Rights (UDHR), the position under the UDHR and International Covenant on Economic, Social and Cultural Rights (ICESCR), and the contributions of the Optional Protocol to the ICESCR. The paper touches on the status and protection of these rights in international, regional and national regimes.

Introduction

Social and economic rights, illustrations of which include the right to food, shelter, work, education, health, etc. among others, can be said to be rights associated with the basic necessities for a life with dignity.¹ In fact, some of these are necessary for the very survival of human beings. While human rights have been commonly classified as "civil and political" or "economic, social, and cultural" or in accordance with Vasak's (1977) categorization of "generations" of rights,² it becomes important when considering these rights to look into their impact on one another and on the quality of human life as

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¹ As observed by the South African Constitutional Court, "[a] society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, equality, and freedom". See *Republic of South Africa vs. Grootboom* (2001) 1 SA 46 (CC), Para 44.

² Karel Vasak (1977), "A 30 Year Struggle", *The UNESCO Courier*, Vol. 30, No. 11, p. 32.