

Chapter-II

EQUAL PAY FOR EQUAL WORK IN INDIA: A SOCIO-LEGAL IMPERATIVE

NATIONAL PERSPECTIVE

The main desire has been for social security since the origin of mankind. All human beings want minimum requirement of food, shelter and clothing. There have been historical revolutions in China, Russia and other countries to have economic security and emancipation from exploiters yoke. In human society, there cannot be mathematic equality nor is it physically and humanly possible. There has been endeavour to reduce it to the minimum gap and effort will continue till the survival of the human beings.¹

Socio-economic structure of India is such that some people live affluently and majority of them lead a life below poverty line. Some have palatial bungalow's to live in and large number of people in big cities like Calcutta, Bombay sleep on pavements and slum. Compulsions of unequal distribution of land in the villages and village society, which is unable to provide employment to its inhabitants, make them to rush to the cities for work. Education is increasing fast, pressure on the land is much. Man on account of dire necessity to eke out livelihood accepts, whatever is given to him. He accepted minimum low wages than minimum or even lesser than fair wages. Strange situation is experienced and seen daily that on account of its having been situated in a disadvantageous position accept lesser wage but his counter parts doing the same work in the same organisation of same

1. R.K. Mahajan: "Doctrine of Equal Pay for Equal Work: Judicial Activism", Vol. I, Jan-April, SC.J, 1991, p. 65.

quality gets more. There is an inequality in such like situation or nature.²

The Constitution of India, in its attempt to build an egalitarian and secular ideology engrafted into it principles of equality, liberty and justice proclaimed in the Declaration of Human Rights.³

The preamble of the Indian Constitution sets out the main objectives, which the framers of the constitution intended to achieve.⁴ It seek to secure to all its citizens including women justice, social, economic and political, liberty of thought, expression, belief, faith and worship, equality of status, and opportunity, and promote among the people of India fraternity assuring dignity of individual for all its citizens including women. The philosophy of the Constitution is enshrined in the fundamental rights and directive principles of state policy. Among the fundamental rights, article 14 guarantees "equality before law and equal protection of laws within the territory of India". Article 15 prohibits discrimination on grounds, *inter alia* of sex. Article 15(3) empowers the state to make, any special provision in favour of women. Article 16 guarantees equality of opportunity in matters of public employment. While Article 16(1) ensure equality of opportunity for all citizens including women in matter relating to employment or appointment to any office under the state, article 16 (2) prohibits discrimination in respect of any employment or office under the state on the ground, *inter alia*, of sex.⁵

2. Ibid.

3. S.C. Srivastava: "Equal Remuneration for men and women", J.I.L.I., 1990. p. 83-84.

4. Dr. Zaheeruddin: "Equal Remuneration to Men and Women", Awards Digest, Vol. XXXII-11-12, Nov-Dec., 2006, p. 272.

5. Randhir Singh vs. Union of India, AIR 1982 SC 879, e.f. Kishori Mohanlal Bakshi vs. Union of India, AIR 1962 SC 1139.

The general statements laid down in the preamble have amplified and elaborated in the Constitution.⁶ The state has been directed "to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political shall inform all the institutions of national life."⁷ Article 39 of the Constitution relating to the directive principles is more specific and comprehensive in nature. This article with six sub-clauses is analogous to one contained in article 45 (2) of the Irish Constitution. This article specifically requires the state to strive for securing equal pay for equal work of both men and women. (Article 39(d)).⁸

A perusal of above discussion lead to the conclusion that "equal pay for equal work" is one of the goals set out by the constitution to be realised or achieved by the labour and other legislation in India. One of the major impediments to the practical achievement of this aim is widespread poverty, unemployment, under employment and illiteracy.

(I) CONSTITUTIONAL CONSPECTUS

(a) Article 39(d) of the Constitution

The concept of social justice consists of diverse principles essential for the orderly growth and development of personality of

6. Part IV, these deals with directive principle of state policy.

7. Art. 38, Constitution of India.

8. Article 39: "The State shall in particular, direct its policy towards securing -

- a) that the citizen, men and women equally, have the right to an adequate means of livelihood.
- b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good.
- c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.
- d) that there is equal pay for equal work for both men and women.
- e) that the health and strength of workers, men and women and the tender age of the children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength.
- f) that children are given opportunities and facilities to developed in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

every citizen. It is a dynamic devise to mitigate the sufferings of the poor, weak and deprived persons of the society and so elevate them to the level of equality to live a life with dignity of person. The aim of social justice is to attain substantial degree of social, economic and political equality, which is the legitimate expectation and constitutional goal. Social justice and equality are complementary to each other so that both should maintain their vitality. Rule of law, therefore, is a potent instrument of social justice to bring about equality.⁹

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. The directive principle under Article 39(d) of the constitution proclaim "equal pay for equal work" for both men and women means equal pay for equal work for every one and as between the sexes. Directive Principles have to be read into the fundamental rights as a matter of interpretation. Article 14 enjoins the state not to deny to any person equality before the law or the equal protection of laws and Article 16 declares that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the state.¹⁰

Article 39 deals with certain principles of policies to be followed by the state. It has been laid down that "equal pay should be given to men and women doing equal work". This article, which apparently envisages equality of pay for men and women, has been applied to enforce equality of pay generally.¹¹ In *Randhir Singh vs. Union of India*,¹² the Supreme Court held that the principle of "equal pay for equal

9. *Air India Statutory Corporation vs. United Labour Union*, AIR 1997 SC 645.

10. D.C.Jain: "Equal Pay for Equal Work: Constitutional Ramification", Award Digest, Journal of Labour Legislation, [Vol. XII: 4], 1986, p. 109.

11. L.C.Dhingra and Arvinder Singh Dalal: "Equal Pay for Equal Work and the Law" A Critical Analysis, M.D.U. Law Journal, 2001, p. 27-28.

12. AIR 1982 SC 879.

work" though not a fundamental right is certainly a constitutional goal and, therefore, capable of enforcement through constitutional remedies under article 32 of the constitution. The doctrine of equal pay for equal work is equally applicable to persons employed on daily wage basis. They are entitled to the same wages as other permanent employees in the department employed to do the identical work.¹³

In *Jeet Singh's case* where Supreme Court invalidating the differences of pay scales of drivers in Delhi Police Force and Delhi Administration and Central Government, the court has relied on Article 39(d).¹⁴ Thus, workers under different establishments and managements cannot automatically claim parity of payment.¹⁵ Similarly, pay scales may differ on the basis of educational qualifications.¹⁶ Equally, differences in housing facilities under different employers may not be unjustified and the court may not issue *mandamus* to allot houses to low income employees in an establishment because such facility is available in another establishment or that the state is a social welfare state.¹⁷

The doctrine of "equal pay for equal work" cannot be put in a strait jacket. This right, although find place in Article 39, is an accompaniment of equality clause enshrined in Articles 14 & 16 of the Constitution. Reasonable classification, based on intelligible criteria having nexus with the object sought to be achieved is permissible. Accordingly, it has been held in *State of U.P. vs. J.P. Chaurasia*,¹⁸ by the Supreme Court that different scale of pay in the same cadre of person doing similar work can be fixed if there is a difference in the nature of

13. Daily Rated Casual Labour vs. Union of India, (1988) SCC 122.

14. Jeet Singh vs. Municipal Corporation of Delhi, (1986) Supp SCC 560.

15. Supreme Court Employees Welfare Association vs. Union of India, (1989) 4 SCC 187.

16. Mewa Ram Kanojia vs. A.I.L.M.S. (1989) 2 SCC 235.

17. Jagdish Prasad vs. M.C.D. (1993) Supp (2) SCC 221.

18. AIR 1989 SC 19.

work done and difference as regards reliability and responsibility. In *State of A.P. vs. V.G. Sreenivasa Rao*,¹⁹ the Supreme Court has held that giving higher pay to a junior in the same cadre is not illegal and violative of Article 14, 16 and 39(d) if there is rational basis for it. In *State of Haryana vs. Rajpal Sharma*,²⁰ it has been held that the teachers employed in privately managed aided schools in State of Haryana are entitled to same salary and dearness allowances as is paid to teachers employed in government school.

In *Federation of A. I. Custom and Central Excise Stenographers (Recog.) vs. Union of India*,²¹ the Supreme Court has emphasized that equal pay must depend on the "nature of the work done" and not "mere volume of work" as "there may be qualitative difference as regard reliability and responsibility." "Functions may be the same but the responsibilities make a different". The Court has further observed:

"The same amount of physical work may entail different quality of work, some more sensitive, some requiring more tact, some less, it varies from nature and culture of employment. The problem about equal pay can't always be translated into a mathematical formula".

In *Markendeya vs. State of Andhra Pradesh*,²² difference in pay scale, between graduate supervisors holding degree in Engineering and non-graduate supervisors being diploma and licence holders was upheld. It was held that on the basis of difference in educational qualifications such difference in pay scales was justified and would not offend Article 14 and 16. The Court pointed out that where two classes of employees perform identical or similar duties and carry out the same functions with the same measure of responsibility having the same academic qualifications, they would be entitled to equal pay. "Principle

19. (1989) 2 SCC 290.

20. AIR 1997 SC 449.

21. AIR 1988 SC 1291; (1988) 3 SCC 91.

22. AIR 1989 SC 1308; (1989) 3 SCC 191.

of equal pay for equal work is applicable among equals. It can't be applied to unequal."²³ Thus, daily rated workers can't be equated with regular employees of the State in the matter of wages. There are differences of qualifications, age, and manner of selection between the two categories of employees.²⁴

Besides, the principle of gender equality in the matter specifically embodied in the Article 39(d), the 'Supreme Court has extracted the general principle of equal pay for equal work by reading Article 14, 16 of the Constitution of India. The Supreme Court has emphasized in *Randhir Singh*, referring to Article 39(d), that the principle of "equal pay for equal work" is not an abstract doctrine but one of substance. Though, the principle is not expressly declared by the constitution to be a fundamental rights yet it may be deduced by construing Article 14 and 16 in the light of Article 39(d).²⁵ The word 'socialist' in the preamble must at least mean "equal pay for equal work". The Supreme Court has observed in *Grih Kalyan Kendra vs. Union of India*:²⁶

"Equal pay for equal work is not expressly declared by the Constitution as a fundamental rights but in view of the directive principle of state policy as contain in Article 39(d) of the Constitution "equal pay for equal work" has assume the status of Fundamental Rights in service jurisprudence having regard to the constitution mandate of equality in Article 14 and 16 of the constitution."

In *Government of Andhra Pradesh and another vs. Hari Hara Prasad P. and others*,²⁷ where there were different rules relating to pay scales and conditions of service governing to sets of employees i.e. (employees of High Court of Judicature, Andhra Pradesh, Hyderabad, employees of

23. State of Tamil Nadu vs. M.R.Alagappan, AIR 1997 SC 2006.

24. State of Haryana vs. Jasmer Singh. 1996(11) SCC 77: Babu Lal, Convener vs. New Delhi Municipal Committee, AIR 1994 SC 2214, State of Orissa vs. Balram Sahu (2002) 8 J.T. 477.

25. M.P. Jain, 'Indian Constitutional Law', Ed.V. 2004, p. 1378.

26. AIR 1991 SC 1173, 1176.

27. (2003) I, LLJ (SC) 213.

various subordinate courts and assistants, typist, steno-typist of the Andhra Pradesh Secretariat Service), the Supreme Court observed that the doctrine of "equal pay for equal work" is an equitable principle but it is not ordinarily permissible for the court either to go into the nature of the duties of employees while exercising writ jurisdiction under Article 226 of the Constitution of India or on the basis to direct grant parity of pay between two sets of employees who were governed by different rules as regards their pay scales and conditions of service.

Before applying the principle of equal pay for equal work, determination of nature of work, qualifications responsibilities etc. are necessary.

In *Orissa University of Agriculture and Technology vs. Manoj K. Mohauly*,²⁸ the Supreme Court observed that the principle of "equal pay for equal work" is not always easy to apply. Nature of work, qualifications, responsibilities etc. need to be compared. The necessary averments and material must be placed before the court for considering the application of the said principle.

In *Government of West Bengal vs. Tarun K. Roy*,²⁹ the very fact that from the very beginning two different pay scales were being maintained is itself suggestive of the fact that the duties and functions are also different. In fact, it is not disputed that of the two posts, the post of Sub-Assistant Engineer is a higher post. Question of violation of Article 14 of the Constitution of India on the part of the State would arise only if the persons are similarly placed. Equality clause contained in Article 14, in other word, will have no application where the persons are not similarly situated on when there is a valid classification based on a reasonable differentia. The doctrine of "equal pay for equal work",

28. (2003) II, LLJ, SC 968.

29. (2004) 1 SCC 347, (2004) I LLJ (SC) 421.

therefore, is not attracted in the instance case. Employees performing the similar job but having different educational qualification can, thus, be treated differently.

In *State of Haryana and others vs. Charanjit Singh and others etc.*,³⁰ the respondents were daily wagers who were appointed as ledger clerks, ledger keepers, pump operators, mali-cum-chowkidar, filters, patrolmen, surveyors etc. All of them claimed the minimum wages payable under the pay scale of regular class IV employees from the date of the appointments. The question whether or not these persons were entitled to the minimum of the pay scale of regular class IV employees.

Supreme Court having considered the authorities and submission are of the view that the authorities in the case of *Jasmer Singh*,³¹ *Tilak Raj*,³² *Orissa University of Agriculture and Technology*,³³ and *Tarun K. Roy*,³⁴ lay down the correct law. Undoubtedly, the doctrine of "equal pay for equal work" is not an abstract doctrine and is capable of being enforced in a court of law. But equal pay must be for equal work of equal value. The principle of "equal pay for equal work" has no mechanical application in every case. Article 14 permits reasonable classification based on qualities or characteristics of persons recruited and grouped together, as against those who were left out. Of course, the qualities or characteristics must have a reasonable relation to the object sought to be achieved. In service matters, merit or experience can be a proper basis for classification for the purposes of pay in order to promote efficiency in administration.

30. AIR 2006 SC 161.

31. AIR 1997 SC 1788

32. 2003 AIR SCW 3382

33. 2003 AIR SCW 2513

34. Supra Note 29

In *Rajbir Singh vs. D.D.A.*,³⁵ the petitioner workman was in employment with the respondent management as a daily wager since 20th March, 1981 and was working as a Beldar. He was paid wages for the same from 20th March, 1981 to 5th January, 1983. With effect from 6th January, 1983, the petitioner was made a work charged Beldar and thereafter w.e.f. 19th March, 1991 he was assigned duties of an LDC with the respondent management. On the above basis, the petitioner claimed that he be paid wages in the pay scale of Rs. 950-1500 which is applicable for LDC/Typist which is class-C post, instead of Rs. 750-940 which is the prescribed pay scale for class-D employees.

The Court has held that petitioner has not gone through the process of recruitment and can't lay claim to the principle of "equal pay for equal work" merely because as a work charged *Beldar* he was assigned duties of an LDC by the respondent management.

Court further observed that the recruitment to regular posts ought not to be made by passing the constitutional scheme of recruitment. There are already rules of recruitment existing for the recruitment to the post of LDC/UDC and therefore the petitioner can't be regularised to the said post in violation of the constitution scheme.

(b) Article 14 of the Constitution of India

Equality is the founding faith of the constitution. It is the foundation stone of the socialist democratic republic. It is the basis of socialism and secularism. It is a dynamic concept in the sense that it promotes brotherhood of men and protects status and dignity of all men. It forbids inequalities, unfairness and arbitrariness.³⁶

Article 14 to 18 constitutes the right to equality. In other constitutions, generally the right to equality is expressed as in Article

35. 2007 Lab.I.C. 1747

36. M.C. Jain Kagzi, 'Kagzi's The Constitution of India' Vol. 2, Ed. VI, 2006, p. 1071.

14. As such, this right was considered generally a negative right of an individual not to be discriminated in access to public office or places or in public matter generally. It did not take account of existing inequalities arising even from the public policies and exercise of public power.³⁷ The makers of India's constitution were not satisfied with that kind of undertaking of the right to equality. They knew of the wider spread social and economic inequalities in the country sanctioned for thousands of years by public policies and exercise of public power supported by religion and other social norms and practices. Such inequalities could not be removed, minimised or taken care of by a provision like Article 14 alone. But even if they could be so taken care of, it would have been a very slow process.³⁸ Therefore, they expressly abolished and prohibited some of the existing inequalities not only in public but even in private affairs and expressly authorised the state to take necessary steps to minimise and remove them. Articles 15 to 18 clearly express such intention of the constitution makers. Even Article 14 cannot be divorced from these later articles and must draw its contents from them though of course it is much wider and general in its scope and application.³⁹

It may be worthwhile to note that Article 7 of the Universal Declaration of Human Rights, 1948, declares that all are equal before the law and are entitled without any discrimination to the equal protection of laws. By and large the same concept of equality inheres in Article 14 of the Indian Constitution.⁴⁰

It may be noted that the right to equality has been declared by Supreme Court as basic feature of the Constitution. The Constitution is

37. V.N. Shukla, 'Constitution of India', Ed. X, 2006, p. 37.

38. Ibid.

39. Ibid.

40. Supra Note 25 at p. 856

wedded to the concept of equality. The preamble to the Constitution emphasizes upon the principle of equality as basic to the constitution. This means that even a constitutional amendment offending the right to equality will be declared invalid.⁴¹ Neither parliament nor any state legislature can transgress the principle of equality.⁴² This principle has been recently reiterated by the Supreme Court in *Badappanavar*⁴³ in the following words:

"Equality is a basic feature of the constitution of India and any treatment of equals unequally or unequal as equal will be violation of basis structure of the constitution of India."

So, the concept of equality gives the idea of oneness, unity and integrity of the nation. Equality is natural instinct. Therefore, it is always claimed by unequal against the antithesis of inequality.⁴⁴ K.K. Mathews says, "the claim of equality is in fact protest against undesired and unjustified inequalities."⁴⁵ In propagating principle of distributive justice, Sharma pointed out "the man should be treated in the same way when there is sufficient reason not to treat them differently."⁴⁶

(i) Equality before the Law under Article 14

Article 14 provides that the State shall not deny to any person equality before the law or equal protection of laws. This clarion phrase "equality before law" finds a place in almost all written constitutions that guarantees fundamental rights.⁴⁷ The first expression equality

41. Ibid.

42. Kesavananda Bharati vs. State of Kerala, AIR 1973 SC 1461, Indira Sawhney vs. Union of India (11) AIR 2000 SC 498: (2000) 1 SCC 168.

43. M.G. Badappanavar vs. State of Karnataka AIR 2001 SC 260 (2001) 2 SCC 666.

44. Kanahaiyalal Sharma, 'Reconstitution of the Constitution of India', 2002, p. 76.

45. State of Kerala vs. N.V. Thomas, AIR 1976 SC 490.

46. Sudesh Kumar Sharma, 'Distributive Justice under Indian Constitution', 1989, p. 77.

47. U.S.A. Section 1 of the 14th Amendment says, "No State shall deny to any person within its jurisdiction the equal protection of the law".

Burma Section 13 "All citizens irrespective of birth, religion, sex, race, are equal before law that is to say, there shall not be any arbitrary discrimination between one citizen or class of citizens and another."

Eire- Section 40(1) "All citizens shall, as human persons be held equal before law".

before the law is of English origin and second expression has been taken from the American constitution. Both these expressions aim to establish what is called equality of status in the preamble of the constitution. Though both the expressions may seem to be identical, they do not convey the same meaning. While 'equality before the law' is a somewhat negative concept implying the absence of any special privilege in favour of individuals and the equal subject of all classes to the ordinary law.⁴⁸

Dr. Jennings put it "Equality before the law means that among equals the law should be equal and should be equally administered, that like should be treated alike."⁴⁹ So, the concept of equality does not mean absolute equality among human which is not possible to achieve. It is a concept implying absence of any special privilege by reason of birth, creed or the like in favour of any individual and also the equal subject of all individuals and classes to the ordinary law of the land.

The guarantee of equality before the law is an aspect of what Dicey calls the rule of Law in England.⁵⁰ It means that no man is above the law and that every person, whatever be his rank or condition, is subject to the jurisdiction of ordinary courts. According to Dicey "every official from the Prime Minister down to constable or a collector of taxes, is under the same responsibilities for every act done without legal justification as any other citizen". Rule of law requires that no person shall be subjected to harsh, uncivilised or discriminatory treatment even when the subject is the securing of the paramount exigencies of law and order.⁵¹

Chile- Article 10 "All inhabitants of the Republic are assured equality before the law".

48. J.N.Panday, 'Constitutional Law of India', Ed. 40 (2003), p. 69.

49. Ivor Jennings, 'Law of the Constitution', Ed. 3, p. 49.

50. A. V. Dicey, 'Introduction to the Study of the Law of the Constitution', Ed. VIII, 1923, p. 189.

51. Rubinder Singh vs. Union of India, AIR 1983 SC 65.

The concept of "equality before law" enumerated in the Article 14 is hinge on the principle of common law and equity and the main object of Article is to secure or ensure that all persons are treated on the equal footing by the state and there should be no discrimination in favour of one as against other.⁵²

(ii) Equal Protection of Law

The guarantee of the equal protection of laws given in Article 14 is semblance to one embodied in the Fourteenth Amendment to the American Constitution.⁵³ The American Supreme Court has from time to time held it as a pledge of equal laws⁵⁴ and as providing for subjection to equal laws applying alike to all in any like situation or circumstances.⁵⁵ It intended to afford legal equality to the black as against the white, it is said to mean equality amongst equals. It implies that there should be no discrimination between one person, and another. It is not good in law, if it arbitrarily selects one individual or one class of individuals, one persons or group of persons, one corporation.

Thus, Article 14 uses two expressions to make the concept of equal treatment a binding principle of state action. The nature and extent of the guarantee has been understood to be the same under both the expressions.⁵⁶ Patanjali Sastri, C.J. observed that the second expression was a corollary of the first.⁵⁷ Moreover, the expression 'equal protection of the laws' is now being read as a positive obligation on the state to ensure equal protection of laws by bringing in necessary social and economic changes so that every one may enjoy equal protection of

52. D.J. De,'Interpretation & Enforcement of Fundamental Rights', 2000, p. 126.

53. The 14th Amendment says: "Nor shall any State deny to any person equal protection of Laws".

54. Yick Wo vs. Hopkins, 118 US 356.

55. Southern Co. vs. Green, 226 US 400 (1412).

56. Supra Note 37 At. p. 38

57. State of W.B. vs. Anwar Ali Sarkar, AIR 1952 SC 75, 79.

laws and nobody is denied such protection. If the state leaves the existing inequalities untouched by its laws, it fails in its duty of providing equal protection of its laws to all persons.⁵⁸

In a number of cases⁵⁹ the Supreme Court has observed that the equal protection of laws guaranteed by Article 14 does not mean that all laws must be general in character. It does not mean that the same laws should apply to all persons. It does not mean that every law must have universal application for, all persons are not, by nature, attainment or circumstances in the same position. The very needs of different classes of persons often require separate treatment.

From the very nature of society, there should be different laws in different places and the legislature controls the policy and enacts laws in the best interest of the safety and security of the state. In fact, identical treatment in unequal circumstances would amount to inequality.⁶⁰ So, a reasonable classification is not only permitted but is necessary if society is to progress.⁶¹

Thus, what Article 14 forbids is class legislation but it does not prohibit reasonable classification. The classification however, must not be "arbitrary, artificial or evasive" but must be based on some real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved by the legislation.⁶² Article 14 applied where equals are treated differently without any reasonable basis. But where equals and unequal are treated differently, article 14 does not

58. *St. Stephen's College vs. University of Delhi*, AIR 1992 SC 1630 at 1662; *Indra Sawhney vs. Union of India*, (2000) 1 SCC 168 at 202. Also G. Austin, working a Democratic Constitution: The India Experience, (1999) p. 669, B.N.Kirpal et. al (eds), *Supreme But Not Infallible* (2000), p. 13.

59. *Chiranjit Lal vs. Union of India*, AIR 1951 SC 41, *State of Bombay vs. F.N. Balsara*, AIR 1951 SC 318, *Kedar Nath vs. State of West Bengal*, AIR 1953 SC 404.

60. *Abdul Rehman vs. Pinto*, AIR 1951 Hyd. 11

61. *Jagjit Singh vs. State*, AIR 1954 Hyd. 28.

62. *R.K. Garg vs. Union of India*, AIR 1981 SC 2138, *Re-special Court bill*, AIR 1979 SC 478, *Air India vs. Nargesh Mirza*, AIR 1981 SC 1829, *R.C. Cooper vs. Union of India*, AIR 1970 SC 564.

apply. Class legislation is that which makes an improper discrimination by conferring particular privileges upon a class of persons arbitrarily selected from a large number of persons. All of whom stand in the same relation to the privilege granted that between whom and the persons not so favoured no reasonable distinction or substantial differences can be found justifying the inclusion of one and the exclusion of the other from such privilege.⁶³

(iii) Test of Reasonable Classification

What Article 14 prohibits is class legislation but it does not forbid reasonable classification of person's, objects and transaction by the legislature for achieving specific ends.⁶⁴ The classification should however, rest upon some real or substantial distinction bearing a reasonable and just relating to the thing in respect of which the classification is made. There could certainly be a law applying to one person or one group of persons and such classification can't be held to be unreasonable or unconstitutional.⁶⁵ In this case the management of the Sholapur Shipping and weaving company close down the mill after serving notice to the worker and the Governor General of India promulgated an ordinance which purported to make special provisions for the proper management and administration of the company. The ordinance provided the Central Government to appoint directors to take over the management and administration of the company and the share holders would be precluded from appointing or nominated any person to be the director of the company so long as the management of the statutory directors continues. The ordinance was replaced by an act incorporating similar and identical provisions and the matter was taken to the Supreme Court by the share holders of the company on the

63. *Monoponier co. vs. City of Los Angeles*, 33 Cal. App. 675.

64. *Supra* Note 48 at p. 73.

65. *Chiranjit Lal vs. Union of India*, AIR 1951 SC 41.

ground that the Act denied the company, and its share holders the equality before the law as such the enactment was violative of Article 14 of the constitution. The Supreme Court held that the Act is not violative of Article 14 of the constitution even though the Act is made applicable in respect of one company and its share holders. The court observed that the legislature has wide field of choice in classifying the subject of its law and a corporation or a group of a persons can be taken to be a class by itself for the purpose of legislation.

*In State of Bombay vs. F.N. Balsara*⁶⁶ the Supreme Court observed that the classification to be reasonable must fulfil the following two conditions.

- (i) the classification must be founded on an intelligence differentia which distinguished the persons or things that are grouped together from other left out of the group and
- (ii) the differentia must have a national relation to the object sought to be achieved by the Act.⁶⁷

Thus the differentia which is the basis of classification and the object of the Act are two distinct things. What is necessary is that there must be nexus between the basis of classification and object of the Act which makes the classification. It is only when there is no reasonable basis for a classification that legislation making such classification may be declared discriminating.

NEW CONCEPT OF EQUALITY: PROTECTION AGAINST ARBITRARINESS

After 1970's equality in Article 14 has acquired new and important dimension, until then the requirement of Article 14 were met if a law or administrative action satisfied the doctrine of reasonable

66. AIR 1951 SC 318.

67. K. Thimmappa vs. Chairman Central Board of Directors SBI, AIR 2001 SC 467.

classification based on nexus test.⁶⁸ Towards, the end of 1973, however, Bhagwati, J. speaking for himself, Chandrachud and Krishna Iyer J.J. in a concurring opinion in *E.P. Royappa vs. State of Tamil Nadu*⁶⁹ giving a new colour and flavour 14 in the following words:

"Equality is a dynamic concept with many aspects and dimensions and it can't be 'cribbed and confined' within traditional and doctrinaire limits. From a positivistic point of view, equality is antithesis to arbitrariness. In fact, equality and arbitrariness are sworn enemies, one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14."

A few months later in *M. Chhaganlal case*,⁷⁰ Bhagwati I. again in a concurring opinion, speaking for himself and Krishna Iyer J. observed: "Article 14 enunciates a vital principle which lies at the core of our republicanism and shines like a beacon light pointing towards the goal of classless equalitarian socio-economic order which we promised to build for ourselves when we made a tryst with destiny on that fateful day when we adopted our constitution. If we have to choose between fanatical devotion to this great principle of equality and feeble allegiance to it, we would unhesitatingly prefer to err on the side of the former as against the latter."

He further said:⁷¹

"What the equality clause is intended to strike at are real and substantial disparities and arbitrary or capricious action of the executive and it would be contrary to the object and intendment of the equality clause to exalt delicate distinction

68. Supra Note 37 at pp. 63-64.

69. (1974) 4 SCC 3, 38: AIR 1974 SC 555. Amarjit Singh vs. State of Punjab, (1975) 3 SCC 503: AIR 1975 SC 984, Paradise Printers vs. Union Territory of Chandigarh (1988) ISCC 440: AIR 1988 SC 354.

70. *M. Chhaganlal vs. Greater Bombay Municipality*, (1974) 2 SCC 402; 435, 436: AIR 1974 SC 2009, 2029.

71. *Ibid* at p. 450 & p. 2039.

shades of harshness and theoretical possibilities of prejudice into legislative inequality or executive discrimination."

In the famous case *Maneka Gandhi vs. Union of India*,⁷² Bhagwati J. again quoted with approval the new concept of equality propounded by him in *E.P. Royappa* case. He said:

"Equality is a dynamic concept with many aspects and dimensions and it can't be imprisoned within traditional and doctrinaire limits. Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which logically, legally and philosophically, is an essential element of equality or non-arbitrariness, pervades Article 14 like a broadening omnipresence."

The same principle was reiterated by Bhagwati J. in *International Airport Authority case*.⁷³

Thus, any arbitrary and unreasonable action or provision made by the state strike at the very root of concept of equality, it would be against the spirit of democratic or republic form of Government and violative of Article 14 of the constitution.

Till now Justice Bhagwati was stating this new approach to Article 14 in his concurring opinions. In *R.D. Shetty vs. International Airport Authority*⁷⁴ and *Kasturilal vs. State of J & K*⁷⁵ he, however, emphatically spoke of it for the unanimous court of three judge bench in each. In *Ajay Hasia vs. Khalid Mujeeb*⁷⁶ he stamped the new approach with a unanimous opinion of a constitution bench of the court in the following words:

72. AIR 1978 SC 597.

73. *R.D. Shetty vs. International Airport Authority*, AIR 1979 SC 1628.

74. *Ibid.*

75. (1980) 4 SCC 1: AIR 1980 SC 1992.

76. (1981) 1 SCC 722, 741: AIR 1981 SC 487 also *Shri Sitaram Sugar Co. Ltd. vs. Union of India* (1990) 3 SCC 223, 251. *Neelima Mishra vs. Harindar Kaur Paintal*, (1990) 2 SCC 746, 761 where the court repeating this principle has extended its application even to quasi-judicial bodies.

"It must now be taken to be well settled that what Article 14 strikes at is arbitrariness because an action that is arbitrary, must necessarily involve negation of equality. The doctrine of classification, which is evolved by the court, is not paraphrase of Article 14 nor is it the objective and end of that Article. It is merely a judicial formula for determining whether the legislative or executive action in question is arbitrary and therefore constituting denial of equality. If the classification is not reasonable and does not satisfy the two conditions referred above (i) intelligible differentia (ii) rational relation between the differentia and the object sought, the impugned legislation or executive action would plainly be arbitrary and the guarantee of equality under Article 14 would be breached. Wherever therefore, there is arbitrariness in State action whether it is of legislature or of the executive or of an "authority" under Article 12, Article 14 immediately springs into action and strike down such state action."

These words of Supreme Court are clear enough to differentiate the new approach from the old one that reasonableness in state action is the need of time and Article 14 of the constitution and the classification doctrine is one of method to achieve that demand. What else is, required to meet that demand is yet to be clear.

According to H.M.Sheervi the old doctrine i.e. the doctrine of classification is the only doctrine which brings out the full scope of equal protection of the laws guaranteed to every person by Article 14, and secondly that new doctrine is untenable for the following reasons.⁷⁷

- a) The new doctrine hands in air, because it propounds a theory of equality without reference to the terms in which Article 14 confers the right to equality.
- b) The new doctrine involves the logical fallacy of the undistributed middle or the fallacy of simple conversion since the new doctrine

77. H.M.Seervai: 'Constitution Law of India', Ed.III, 1983, p. 275,

has been propounded by judges without asking or answering the question, "what is meant by equal protection of laws". We must reply to that query. If all men were created equal and remained equal throughout their life, then the same laws would apply to all men. But we know that men are unequal, consequently a right conferred on persons that they shall not be denied equal protection of the laws cannot mean the protection of the same laws for all. It is lucid that the 'doctrine of classification' steps in and gives significance to the guarantee of the equal protection of the laws. Equal protection of the laws must mean the protection of equal laws for all persons similarly situated.

- c) The new doctrine fails to distinguish between the violation of equality by a law and its violation by executive action.
- d) The new doctrine fails to analyse certain concepts like arbitrary law, 'executive action' or 'discretionary powers' and fails to recognise the necessary implication of numerous Supreme Court decisions on classification.

The real meaning and scope of Article 14 has been explained in several decisions of the Supreme Court and they were referred to and their effect was summarised by Chief Justice DAS in *Dalmia case*.⁷⁸

- 1) Article 14 condemns discrimination not only by substantive law but by a law of procedure.
- 2) Article 14 forbids class legislation but permits reasonable classification.
- 3) Permissible classification must satisfy two conditions, namely (i) it must be founded on an intelligible differentia which distinguishes persons or things that are grouped and (ii) the differentia must have a rational relation to the object sought to be achieved by the statute in question.
- 4) The differentia and objects are different elements and follows that the object by itself cannot be the basis of the classification.
- 5) A law may be constitutionally valid even though it relates to a single individual if on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by itself.

78. Ramkrishna Dalmia vs. Justice Tendolkar, AIR 1958 SC 538.

- 6) There is always presumption in favour of the constitutionality of a statute and the burden is upon him who attacks it to show that there has been clear transgression of constitutional principles.
- 7) The presumption may be rebutted in certain cases by showing that on the fact of the statute, there is no classification at all and no difference peculiar to any individual or class and not applicable to any other individual or class, and yet the law hits only a particular individual.
- 8) It must be presumed that the legislature understand and correctly appreciate the needs of its own people, that its laws are directed to problem's made manifest by experience and that its discrimination are based on adequate grounds.
- 9) In order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation.
- 10) That the legislature is free to recognise degree of harm and may confine its restriction to those cases where the need is deemed to be clearest.
- 11) While good faith and knowledge of the existing conditions on the part of a legislature are to be presumed, if there is nothing on the face of law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality can't be carried to the extent of always holding that there must be some undisclosed and unknowing reasons for subjecting certain individuals or corporations to be hostile or discriminating legislation.
- 12) The classification may be made on different basis e.g., geographical or according to the objects or occupations or the like.
- 13) The classification made by legislature need not be scientifically perfect or logically complete.⁷⁹ Mathematical nicety and perfect equality are not required.⁸⁰ Equality before the law does not require mathematical equality of persons in all circumstances. Equal treatment does not mean identical treatment. Similarly, not identity of treatment is enough.⁸¹

79. Kedar Nath vs. State of West Bengal, AIR 1953 SC 404: 1954 SCR 30,

80. Kameshwar Singh vs. State of Bihar, AIR 1954 Pat. 91.

81. State of Bombay vs. F.N. Balsara, AIR 1951 SC 318.

- 14) There can be discrimination both in substantive as well as the procedural law. Article 14 applies to both.⁸²

Thus, from the above classification established by the '*Dalmia*'s case it is lucid that the principle underlying the guarantee of equality under Article 14 is that all persons similarly situated or under similar circumstance shall be treated alike and equal laws should have to be applied to all in the same situation and there should be no discrimination between one person and another if their position is substantially the same. By the process of classification, the state has the power of determining, who should be regarded as a class for the purpose of legislation and in relation to law enacted on a particular subject. This power no doubt, to the some extent, is likely to produce some inequality but if a law deals with the liberties of a number of well defined classes it is open to the charge of denial of equal protection on the grounds that it has no application to other persons.

(c) Article 16 of the Constitution

Clause (1) and (2) of Article 16 of the Constitution guarantee equality of opportunity to all its citizens in the matter of appointment to any office or of any other employment under the state.⁸³ No citizen can be discriminated against or be ineligible for any employment or office under the State on the grounds only of religion, race, caste, sex, decent, place of birth or residence.⁸⁴

Here researcher is concerned with the two aspects of the principle of equality. One equality in wages, and another equal opportunity in appointment and occupation.

82. State of West Bengal vs. Anwar Ali, AIR 1952 SC,75.

83. D.D. Basu, 'Shoter Constitution of India', Ed. X, 1988, p. 71.

84. Supra Note 48 at p. 124.

To protect the right to equality and sort of discrimination must discourage and banned. Broadly speaking, discrimination practiced in two fields, i.e. wages and employment and that too mainly on the ground of sex. All over the world women has been treated as sub human being. However, with the progress of time, development of civilization and advancement of human rights movement it has been strived to ameliorate her position through law as well as otherwise.⁸⁵ Jenk say that:

*"It has been said that equality of any civilization may be judge by the Statute which it accords to women. Equality between the sexes, **like** racial equality, has become one of the seminal principles of contemporary social thought. In such a situation it is not unnatural **that** the claim for equal remuneration for men and women workers for the work of equal value should have become almost a symbol of the general of equality between the sexes. "⁸⁶*

The right to equal remuneration has been recognised by the Universal Declaration,⁸⁷ as well as the Indian Constitution,⁸⁸ but none of them is of binding nature. In India, this provision, having been made part of Chapter IV of the Constitution, which contain simply social goals, to be achieved by the state but does not make it enforceable.

However, towards achieving the above mentioned social goal, in 1976 the Equal Remuneration Act, was passed by the Parliament to provide for the payment of equal remuneration to men and women workers and for the prevention of discrimination on the ground of sex against women in the matter of employment and for the matters connected therewith or identical thereto.

85. O.P. Parmer: "ILO and India in pursuit of Human Rights through Labour Standard", 23 JILI (1981) p. 556.

86. C.W. Jenks, 'Human Rights and International Labour Standards', 1960, p. 91.

87. Article 23 (2).

88. Article 39 (d).

Thus, the Equal Remuneration Act fulfils to large extent not only the objectives laid down in Article 39(d) of the constitution but also of the International Labour Organisation convention, 1951, 1958 and of Article 16(1).

According to Article 16(l)

"There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the state."

Article 16 guaranteed against discrimination is limited to 'employment' and 'appointment' under the state. It embodies the particular application of general rule of equality laid down in Article 14 with special reference for appointment and employment under the state.⁸⁹

As Article 16 guarantees equality of opportunity in matter of appointment in state services. It does not however, prevent the state from prescribing the necessary qualifications and selective tests for recruitment for government services. The qualifications prescribed may besides mental excellence, include physical fitness, sense of discipline, moral integrity loyalty to the state. Where the appointment requires technical knowledge, technical qualification may be prescribed.⁹⁰

In *C.B, Muthamma's case*⁹¹ a provision in service rules requiring a female employee to obtain the permission of the Government in writing before her marriage is solemnized and denying her the right to be promoted on the ground that the candidate was married women. It was held to be discriminatory against women and hence unconstitutional.

89. Sukhnandan Thakur vs. State of Bihar, AIR 1957 Pat. 617, followed in Sampath vs. State of Madras, AIR 1967 Mad. 485.

90. Banarsidas vs. State of U.P. AIR 1956 SC 520.

91. C.B. Muthamma vs. Union of India, AIR 1979 SC 1868.

In *Air India case* (popularly known as *Air Hostesses case*)⁹² the petitioner challenged the validity of the regulation under which they could be retired at the age of 33 years or if they got married within four years of their service or on first pregnancy on the ground that they were discriminatory and violative of Article 14, 15 and 16 of the constitution. The court held that the provision on pregnancy bar and the retirement and the option of the Managing Director were unconstitutional as being unreasonable and arbitrary and violative of Article 14 and 16 of the constitution.

In *Triloki Nath and others*,⁹³ a cadre of Assistant Engineer's including degree holders and diploma holders, they constituted one class of service, but for promotion to the post of Executive Engineers only these Assistant Engineers were eligible who possessed Bachelor's degree in Engineering and the Diploma holders were eligible only if they had put in 7 years minimum service, no such restriction was prescribed for degree holders. The diploma holder's assistant engineers challenged the validity of the rule on the ground that it denied them equal opportunity of promotion in violation of Article 14 and 16 of the constitution. On a detailed consideration a constitution Bench of Supreme Court upheld the classification on the ground of difference in educational qualification. The court held that the classification had reasonable nexus to achieve administrative efficiency in engineering services.

In *D.S. Nakara case*,⁹⁴ the Supreme Court struck down Rule 34 of the Central Services (pension) Rule, 1972 as unconstitutional on the ground that the classification made by it between pensioner's retiring before a particular date and retiring after that date was not based on

92. *Air India vs. Nargesh Mirza*, AIR 1981 SC 1829.

93. *State of J & K vs. Triloki Nath*, (1974) 1, SCJ 366.

94. *D.S. Nakara vs. Union of India*, AIR 1983 SC 130.

any rational principle and was arbitrary and violative of Article 14 of the Constitution.

The Supreme Court in the case of *West Bengal State Electricity Board*⁹⁵ has observed that a regulation that authorises the termination of services of a permanent employee by serving three month notices or on payment of salary for the corresponding period in lieu thereof was *ex facies*, totally arbitrary and thereof violative of Article 14 and 16 of the Constitution. The Supreme Court further observed that it was naked 'hire and fire' and parallel of which was to be found only in the "Henry VII clause" which observed to be banished altogether from employer and employees relationship. In view of this position in law, I am not at all impressed by the argument of the learned government pleaders that the petitioner herein were appointed purely on temporary basis and therefore, their service could be terminated at the sweet will of the government. As a matter of fact, on completion of three years of continuous service, the petitioner had become permanent.

In *Randhir Singh case*,⁹⁶ it has been held that equal pay for equal work although not expressly declared to be a fundamental right is clearly a constitutional goal under Article 14, 16 and 39(d) of the constitution and can be enforced by the courts in cases of unequal scales of pay based on irrational classification. This principle has been followed in a number of cases⁹⁷ and has virtually become a fundamental right. The doctrine of equal pay for equal work is equally applicable to temporary or casual employees performing the same duties and function.⁹⁸

95. *West Bengal State Electricity Board vs. D.B. Ghosh*, AIR 1985 SC.

96. *Randhir Singh vs. Union of India*, AIR 1982 SC 879.

97. *D.S. Nakara vs. Union of India*, AIR 1983 SC 130, *P.K. Ram Chandra Iyer vs. Union of India*, AIR 1984 SC 541.

98. *Daily Rated Casual Labour vs. Union of India* (1988) 1 SCC 122, *Jaipal vs. State of Haryana* (1988) 3, SCC 354,

In *Dhirendra Charnoli vs. State of U.P.*,⁹⁹ it has been held that the principle of equal pay for equal work is also applicable to casual workers employed on daily wage basis. Accordingly, it was held that persons employed in Nehru Yuwak Kendra in the country as casual workers on daily wages basis were doing the same work as done by class IV employees appointed on regular basis and therefore, entitled to the same salary and conditions of service. It makes no difference whether they are appointed in sanctioned post or not. It is not open to the government to deny such benefit to them on the ground that they accepted the employment with full knowledge that they would be paid daily wages. Such denial would amount to violation of Article 14.

In case of *Daily Rated Casual Labour*,¹⁰⁰ it has been held that the daily rated casual labours in P & T Department who were doing similar work as done by the regular workers of the department were entitled to minimum pay in the pay scale of the regular worker plus D.A. but without increments. Classification of employees the purpose of payment of less than minimum pay is violative of Article 14 and 16 of the Constitution and denial of minimum pay amounts to exploitation of labour.

In *Frank Anthony Public School Employees Association*,¹⁰¹ the court held that the teachers and employees of Frank Anthony Public School are entitled to parity in pay scales and other conditions of service with those available to their counterparts in government school. The discrimination made by Section 12 of the Delhi School Education Act in pay and other conditions of service of school teacher merely on

99. *Dhirendra Chamoli vs. State of U.P.* 1988 (1) SCC 637

100. *Daily Rated Casual Labour vs. Union of India* (1988) 1 SCC 122.

101. *Frank Anthony Public School Employees Association vs. Union of India* (1986) 4 SCC 707.

the ground of aided schools and unaided minority schools is violative of Article 14.

However, the principle of 'equal pay for equal work' has no mathematical application in every case of similar work. There can be two scale of pay in the same cadre of persons performing the same or similar work or duties. Of course, the functions of two posts may appear to be the same or similar but there may difference in degree of performance. The quantity of work may be same, but quality may be different. Accordingly in *F.A.I.C. and C.E.S. case*,¹⁰² it was held that different pay scales fixed for stenographers grade 1 of the Central Secretariat and those attached to the heads of subordinate offices on the basis of recommendations of the Third Pay Commission was not violative of Articles 14 and 16 of the constitution. The duties and responsibilities of stenographer's grade I was of much higher nature than that of the stenographers attached to the subordinate office. Court observed that:

"Equal pay must depend upon the nature of the work done. It can't be judged by the mere volume of work. There may be qualitative difference as regards reliability and responsibility. The functions may be same but the responsibilities make a difference. Equal pay for equal work is a concomitant of Article 14 of the constitution. But it follows naturally that equal pay for unequal work will be a negation of the right."

Similarly in *J.P. Chaurasia case*,¹⁰³ it has been held that the Bench Secretaries of the Allahabad High Court grade I are entitled to a higher pay scale than the Bench Secretaries grade II as they have to perform much more higher degree of duties and responsibilities, than those

102. *F.A.I.C. and C.E.S. vs. Union of India* (1988) 3 SCC 91.

103. *State of U.P. vs. J.P. Chaurasia*, AIR 1989 SC 19, See also *State of A.P. vs. Srinivasa Rao* (1989) 2 SCC 29.

performed by the Bench Secretary grade II. Their entitlement to higher pay is based on selection based on merit-cum-seniority. When Bench Secretaries grade II acquire experience and also display more merit, they are appointed as Bench Secretaries grade I.

In *Mewa RamKanojia case*,¹⁰⁴ the Supreme Court has held that the state has to prescribe different scale of pay for different posts having regard to educational qualification, duties and responsibilities of post.

Equality must be among equals, unequal can't claim equality even if the duties and functions are of similar nature, but if the educational qualifications prescribed for the two posts are different and there is difference in measure of responsibilities, the principle of equal pay for equal work would not apply. Accordingly, it has been held that since the Hearing Therapist and Audiologists in the AIMS both render professional services and there is qualitative difference between the two on the basis of educational qualification.

In *Pramod Bhartiya case*,¹⁰⁵ the Supreme Court has explained that the doctrine of "equal pay for equal work" is implicit in the doctrine of equality enshrined in Article 14 and flows from it. The rule is as much a part of Article 14 as it is of Article 16(1).

In *Gopika Ranjan Chowdhary vs. Union of India*,¹⁰⁶ the armed forces controlled by NEFA were re-organised as a result of which a separate unit known as Central Record and Pay Account Office was created at the head quarters. The Third Pay Commission has recommended two different scale of pay for the ministerial staff, one attached to the headquarters and other to the Battalions/units. The pay scales of the

104. *Mewa Ram Kanojia vs. All India Institute of Medical Science*, AIR 1989 SC 1256: Harbans Lal vs. State of H.P. (1989) SC 459: (1989) 2 SCC 235,

105. *State of Madhya Pradesh vs. Pramod Bhartiya*, AIR 1993 SC 286:(1993) 1 SCC 539.

106. AIR 1990 SC 1212, *U.P.-Rajya Sahakari Bhoomi Vikas Bank U.P. vs. Its Workmen*, AIR 1990 SC 495.

staff at the headquarters were higher than those of the staff attached to the Battalions/units. It was held that this was discriminatory and violative of Article 14 as there was no difference in nature of work, duties and responsibilities of the staff working in the Battalions/units and those working at the headquarters. There was also no difference in the qualifications required for the appointment in the two establishments. The service of the staff from Battalions/units is transferable to the headquarters.

In *Associated Bank Officers Association vs. State Bank of India*,¹⁰⁷ it has been held that the employees of subordinate bank of the State Bank cannot be treated as the employees of the State Bank of India and therefore not entitled to the same benefits as regards the pay and allowances, The subsidiary Banks are set-up as a separate Bank with its own capital structure, its own staff, with its own terms and conditions of service. The officers of the State Bank and subsidiary Banks are not in a comparable position considering the responsibilities of officers of the State Bank of India. Besides, the benefits extended to the officers of the subsidiary Banks are in accordance with the agreement between the unions of the employees and the management of each bank. In view of this, the court held that the principle of equal pay for equal work cannot be applied in this case.

A perusal of the above study under constitutional conspectus, researcher reached to the conclusion that the principle of "equal pay for equal work" has been explicitly enshrined under Article 39(d) of the constitution, which is not enforceable parse. But it has its genesis in international legal dimension. As it is expressly provided by French Declaration of right of man and of the citizen, 1791, which stated that "All men are created equal" and preamble of the International Labour

107. AIR 1998 SC 32.

Organisation provided for the "equal remuneration for work of equal value" for the first time. It has been deduced from Article 14 and 16 of the constitution. Article 14 and 16 are enumerated under part III of the constitution as a fundamental right. But it is suggested that the 'battle cry' of the hours is to inculcate this principle under Article 21 of the constitution by way of constitutional amendment. Because denial of "Equal pay for equal work" amounts to denial of right to life, while it is judiciary, which has devised a mechanism in a consonance with mandatory and obligatory philosophy of the constitution.

(II) LEGISLATIVE LOGISTIC

(a) Supra National Perspective

The International Labour Organisation has, from the outset accepted and, on several occasion, reaffirmed the principle of equal remuneration for men and women doing work of equal value. The question has been in the limelight particularly during and since the war, although the issue is by no means a new one. During the Second World War, women replaced in a great many occupation or were employed in new occupation, and large numbers of women were drawn into the employment market to meet urgent demands for labour, particularly in war industries. At that time, the problem of equal remuneration was primarily considered as that of protecting men's wages and of preventing their being levelled down by the employment of women at lower rate¹⁰⁸.

In most countries, female labour forms a substantial proportion of the total labour force, whether the economy of the country is predominantly agricultural or industrial in character. Moreover, efforts are being made in many countries, where industrialization or economic

108. International Labour Conference, 'Equal Remuneration for Men and Women Workers for work of Equal Value', 33rd Session, Geneva, (1950), Report V (1), p. 2.

planning is developing, to make better use of female labour either by drawing new supplies of such labour into the employment market, or by redistributing the existing supply, or by both methods¹⁰⁹.

The constitution of the International Labour Organisation, as originally adopted in 1919, proclaimed the “special and urgent importance” of “the principle that men and women should receive equal remuneration for the work of equal value”¹¹⁰. The preamble of the amended constitution which came into force in 1948 proclaims that “improvement (of the conditions of labour) is urgently required by recognition of the principle of equal remuneration for work of equal value.”

A first step towards the application of the principal was taken by the I.L.O., in 1928, in dealing with the question of creating or maintaining machinery whereby minimum wage rates may be fixed in trades or parts of trades in which no arrangements exist for the effective regulation of wages by collective agreement or otherwise and in which wages are exceptionally low. The conference then called the attention of the Governments¹¹¹ to the principle affirmed in the Constitution of 1919.

In 1944, the International Labour Conference, discussing the principle and methods which should govern the organization of employment in the transition from war to peace, further recommended that “in order to place women on a basis of equality with men in the employment market.... Step should be taken to encourage the establishment of wage rates on the basis of job content without

109. Id. at. p. 3.

110. Article 41, International Labour Organisation, 1919.

111. Minimum wage – Fixing Machinery Recommendation, 1928 (part-B), which supplements the Convention (No-26) concerning the creation of minimum wage-fixing machinery.

regard to sex”¹¹². To this end, it suggested that “investigation should be conducted in co-operation with employers and workers organizations, for the purpose of establishing precise and objective standards for determining job content, irrespective of the sex of the worker, as a basis for determining wage rates¹¹³.

The principle of equal remuneration was also included in the convention concerning social policy in non-metropolitan territories, adopted in 1947, which stipulates that “it shall be an aim of policy to abolish all discrimination among workers on grounds of race, colour, sex.... In respect of... a wage rate which shall be fixed according to the principle of equal pay for work of equal value in the same operation and undertaking to the extent to which recognition of this principle is accorded in the metropolitan territory”¹¹⁴. This convention further provides in paragraph 2 of the same article that “all practicable measures shall be taken to lessen, by raising the rates applicable to the lower paid workers, any existing differences in wage rates due to discrimination by reason of race, colour, and sex¹¹⁵.

As differentials between men’s and women’s wage rates have still prevailed, the international conference has on several occasions renewed the plea for the application of the principle of equal remuneration. In 1937, the conference, considering that there was need to re-examine the general position of women workers, and, in particular, that they should receive remuneration without discrimination because of sex requested the Governing Body to draw this principle to the attention of all Governments with a view to its

112. Employment (Transition from War to peace) Recommendation, 1944, Paragraph 37 (1), see also Guiding Principle IX.

113. *Id.* at. p. 37(2).

114. Article 18 Para 1 of the Convention concerning social policy in Non-Metropolitan Territories, 1947.

115. Article 18 para 2.

establishment in law and custom by legislative and administrative action. In 1939 and 1947, the conference adopted further resolutions re-affirming the importance of the principle as laid down in the Constitution of the I.L.O.¹¹⁶

The principle has its genesis in the Universal Declaration of Human Rights which the General Assembly of the United Nations adopted and proclaimed on 10 December, 1948 (without any dissenting vote against it) as a common standard of achievement of all people and all nations". It stipulates that "Everyone without any discrimination has a right to equal pay for equal work"¹¹⁷. Further Article 7 of the International Covenant on Economic and Cultural Rights of 1966, *Inter alia*, provide:

"The states parties to the present covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular the equal remuneration for work of equal value without distinction of any kind in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work."

Earlier in February 1957, at its 11th session, the General Assembly of the United Nations third Committee adopted the text of Article 7 of the draft international Covenant on Economic, Social and Cultural Rights, which recognized as follows:

"The right of everyone to enjoyment of just and favourable conditions of work including fair wage and equal remuneration for work of equal value without distinction of any kind, in particular, women being guaranteed equal pay for equal work."

116. *Supra* Note 1 at. p.9.

117. Article 23 (2) of the Universal Declaration of Human Rights, 10 December, 1948.

Article 26 of the International Covenant on Civil and Political Rights (1966) provides that:

“all the persons are equal before the law and have the right to equal protection by the law without discrimination.”

In this respect, the law prohibits all discrimination and guarantees to all persons equal and efficient protection against discrimination, notably of race, colour, sex, language, creed, political opinion and any other opinion of national or social origin, of fortune, birth, or any other situation. Moreover, Article 10 of the Declaration on the Elimination of Discrimination in regard to women 1967, *inter alia*, provides:

“All appropriate measures shall be taken to ensure to women married or unmarried, the same right as to men in the field of economic and social life and notably the right to equality of remuneration with men and equality of pay for work of equal value”.

In the United Nations the Commission on the status of women, a functional commission of the Economic and social Council, has recognized the need for providing “equal pay for equal work” for men and women workers. It has also taken several steps to promote the principles of equal pay. For instance, in 1947, at its first session, it set forth as one of its aim that women should enjoy the same rights as men with regard to wages. In 1948, at its second session, it “adopted a resolution affirming its support of the principle of equal pay and recommended that the Economic and social Council call on member states to encourage application of the principles by all possible means¹¹⁸.

118. S.C. Srivastava “Equal Remuneration for Men and Women” J.I.L.I. NO.1 (1990), p. 83.

One further international endorsement of the general principle of equal remuneration may be mentioned. The Ninth International Conference of American state held at Bogota in May, 1948 adopted on Inter-American character of Social Guarantees which state, that “there should be equal compensation for equal work, regardless of sex, race, creed, or nationality of the worker¹¹⁹.”

(i) Convention of International Labour Organisation, 1951

A significant milestone in acceptance and promotion of the principle of “equal pay for equal work” was reached with the establishment of the International Labour Organisation. While preamble to the ILO Constitution of 1919 stressed the urgency of, *inter alia*, recognition of principle of “equal remuneration for work of equal value”, the preamble to the constitution as amended in 1948 reaffirmed the urgency in improvement of the conditions of labour as regards the principle of “equal pay for equal work”. In May 1944, the Philadelphia Declaration, which set down the aims and objectives of ILO and principles of social policy that were to inspire member states, had affirmed among the principles basic to social justice that “all human beings regardless of race, creed, or sex have the right to pursue their material progress and spiritual development in liberty and dignity, in economic security and with equal changes”. In its 34th session ILO adopted a convention concerning equal remuneration for men and women workers for work of equal value, known as Equal Remuneration convention in 1951. This was complemented by recommendation No. 90 of ILO 1951. The latter underlined that the achievement of equality of remuneration should be accompanied by more extensive measures than were fixing of pay rates. In 1958, ILO

119. United State, Department of State: Release date 21 May, 1948 Final Act of Bogota and Resolutions, p. 32.

concluded convention No. 111 against discrimination in matters of employment and profession.

In September 1958, India ratified ILO Convention NO. 111 which requires a member-state ratifying it to promote as well as ensure application of principle of equal remuneration to all workers through national laws or regulations, legally established or recognized machinery for wage determination, collective agreements between employers and workers or a combination of these means.

The Convention concerning the Equal Remuneration for men and women workers for the work of equal value (Equal Remuneration, 1951) was adopted by the General Conference of the ILO on June 29, 1951. The convention lays down the general principle that each ratifying state shall promote and in so far as is consistent with the methods in operation in its country for determining rates of remuneration for men and women workers for the work of equal value. Equality must be applied not only to the basic or minimum wages but also to any additional emoluments whatsoever directly or indirectly, whether in cash or in kind of the workers employment¹²⁰.

Article 2 of the Convention provides that "Each Member shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value," and this principle may be applied by means of

- (a) National laws or regulations,
- (b) Legally established or recognized machinery for wage determination,
- (c) Collective agreements, between employers and workers, or
- (d) A combination of these various means¹²¹

120. Article 1 of the Equal Remuneration Convention, 1951.

121 Article 2 of the Equal Remuneration Convention, 1951.

Article 3 of the Convention provides that:

“Where such action shall assist in giving effect to the provision of this convention, measure shall be taken to promote objective appraisal of jobs on the basis of work to be performed. The method to be followed in this appraisal may be decided upon by the authorities responsible for the determination of rates of remuneration, or, where such rates are determined by collective agreements, by parties thereto. Differential rates between workers, with correspond, without regard to sex, to differences, as determined by such objective appraisal, in the work to be performed, shall not be considered as being contrary to the principle of equal remuneration for men and women workers for work of equal value”.¹²²

Article 4 provides that:

“Each member shall co-operate as appropriate with the employer’s and workers organization concerned for the purpose of giving effect to the provision of this convention.”¹²³

By virtue of these provisions of the convention the member states are required to take effective enforcement measures, so that the principle regarding ‘equal remuneration for work of equal value’ may be applied by enacting laws and regulations by such member states.

(ii) Equal Remuneration for Men and Women Workers for Work of Equal Value

The Conference recommended that each member should, subject to the provision of Article 2 of the Convention, apply the following provision and report to the International Labour Office on request by governing body concerning the measures taken to give effect thereto:¹²⁴

122 Article 3 of the Equal Remuneration Convention, 1951.

123 Article 4 of the Equal Remuneration Convention, 1951.

124 Equal Remuneration /Recommendation, 1951: International Labour Convention and Remuneration, 1919-1981, ILO, Geneva, p. 44.

1. Appropriate action should be taken, after consultation with the workers organization concerned, or where such organization do not exist with the workers concerned -

- (a) to ensure the application of the principle of equal remuneration for men and women workers or work of equal value to all employees of Central Government department or agencies, and
- (b) to encourage the application of the principle to employees of state, provincial or local government departments or agencies, where these have justification over rate of remuneration.

2. Appropriate action should be taken, after consultation with the employers and workers, organization concerned, to ensure as rapidly as practicable, the application of the principle of 'equal remuneration for men and women workers for work of equal value' in all occupations, other than those mentioned in paragraphs-1 in which rates of remuneration are subjected to regulation or public control, particularly as regards.

- (a) The establishment of minimum or other wage rates in industries and services where such rates are determined under public authority.
 - (b) Industries and undertakings operated under public ownership or control, and
 - (c) Where appropriate work, executed under the terms of public contracts.
3. (i) Where appropriate in the light of the methods in operation for the determination of rates of remuneration, provision should be made by legal enactment for the general application of the principle 'equal remuneration for the men and women workers for the work of equal value.'
- (ii) The competent public authority should take all necessary and appropriate measures to ensure that employers and workers are fully informed as to such legal requirements and, where appropriate, advised on their application.

4. When after consultation with the organization of workers and employers concerned, where such exist, it is not deemed feasible to

implement immediately the principle of 'equal remuneration for men and women workers for work of equal value' in respect of employment covered by paragraph 1, 2 and 3, appropriate provision should be made or caused to be made, as possible for its progressive application, by such measures as:

- (a) Decreasing the differentials between rates of remuneration for men and rates of remuneration for women for work of equal value: and
- (b) Where a system of increment is in face, providing equal increments for men and women workers performing work of equal value.

5. Where appropriate for the purpose of facilitating the determination of rates or remuneration in accordance with the principle of 'equal remuneration for men and women workers for work of equal value' each member should, in agreement with the employer's and workers' organization concerned, establish or encourage the establishment of methods for objective appraisal of the work to be performed, whether by analysis or by other procedures, with a view to providing classification of job without regard to sex, such methods should be applied in accordance with the provisions of Article 2 of the convention.

6. In order to facilitate the application of the principle of 'equal remuneration for men and women workers for worker of equal value' appropriate action should be taken where necessary to raise the productive efficiency of women workers by such measures as

- (a) ensuring that workers of both sex have equal or equivalent facilities for vocational training and placement.
- (b) Taking appropriate measures to encourage women to use facilities for vocational guidance, employment or counselling for vocational training and placement.

- (c) Providing welfare and social services which meet the needs of women workers, particularly those with family responsibilities and financing such services or industrial welfare funds finance by payments made in respect of workers without regard to sex, and
 - (d) Promoting equality of men and women workers as regard access to occupations and posts without prejudice to the provisions of international regulations concerning the protection of the health and welfare of women.
7. Every effort should be made to promote public understanding of the grounds in which it is considered that the principle of equal remuneration for men and women workers for work of equal value should be implemented.
8. Such investigation as may be desirable to promote the application of the principle should be undertaken.

(b) Parliamentary Debate

The bill to provide for the payment of equal remuneration to men and women workers and for the prevention of discrimination on the ground of sex, against women in the matter of employment and for other matters connected with be taken into consideration¹²⁵. The Minister of Labour *K.V. Raghunatha Reddy*, while moving the Equal Remuneration Bill, 1976 said

“A significant measure taken by Government in recent months has been the promulgation of the Equal Remuneration Ordinance providing for the payment of equal remuneration to men and women workers and for the prevention of discrimination against women, on the ground of sex, in the matter of employment and for other connected matters. This measure is significant not only because it coincides with the International Women’s year, and bring, us fully in line with accepted. International standards, but also because it brings immediate

125. Rajya Sabha Debate, 12 Jan, 1976, p. 152.

relief to millions of our womenfolk employed or seeking employment. As most of those women belong to the weaker sections of the community and are largely employed in agriculture and unorganized sectors of the industry, it is only appropriate that this measure was taken on a priority basis, as a part of the Governments policy of improving the condition of the weaker and exploited sections of the community”¹²⁶.

Although we, in India, have always held our women in high regard and given them a position of importance in society, their contribution to the economic life of the community has not been fully appreciated, but a radical change in attitudes has been brought about by the nation’s struggle for independence. Indian women, by their active participation have earned their rightful place in the community and won their legal rights, without the need for any aggressive feminist movement. Their claim for a position of complete equality in law was justified in terms of their significant contribution to the cause of the country’s freedom, and it was fully recognized by the founding fathers of the India Republic. The Indian Constitution provides the right of equal opportunity for employment to men and women without distinction¹²⁷. Modern India’s attitude to this issue is epitomized in the following words of our esteemed Prime Minister

“I believe in the liberation of women in the same way as I believe in the liberation of men that is liberation from all kinds of obscurantism and superstition from the narrow confines of out-dated thought and habits. Men and women together can help to create a better society and a better world. In this, there should be no question of class, creed, sex or party”¹²⁸.

126. Id. at. page No. 153.

127. Ibid.

128. Id. at. page No. 153-154

Article 15 of the Constitution prohibits any discrimination on grounds of sex and Article 39 of the Constitution of India envisages that the State shall direct its policy, amongst other things, toward securing that "there is equal pay for equal work for both men and women"¹²⁹. India ratified in September, 1958 the ILO Convention No 100 concerning Equal Remuneration for Men and Women Worker for work of Equal value, which requires a member-State ratifying the convention to promote as well as ensure the application of the principle of equal remuneration to all workers through national laws or regulations, legally established or recognized machinery for wage determination, collective agreements between employers and workers or a combination of these various means¹³⁰.

The law which provides for the fixation of minimum wages in India is the Minimum Wages Act, 1948. Under it the appropriate Government (the Central or the State Government) is responsible for the fixation of minimum wages in respect of certain employments specified in the Schedule to the Act. The Act does not, however, specifically provide that wages to be paid to men and women workers should be equal. Consequently, different rates of wages were laid down in several cases at the time of initial fixation of minimum wages. Besides, there is no restriction on the fixation of different rates of wages for men and women in the sectors not covered by the Minimum Wages Act, in particular, wages evolved as a result of bipartite or tripartite negotiations or adjudication or arbitration award could be different for men and women for similar job¹³¹.

While over the years there has been some narrowing down of the differences in wages of men and women workers wages disparities on

129. Article 39 (d) of the 'Constitution of India

130. LSD, Jan 30, 1976, p. 170

131. Id.at. pp. 170-171.

the grounds of sex still exist in the country, even after decades of the ratification of the International Labour Organization Convention¹³². The National Commission on Labour while noting that the fixation of statutory minimum wages has tended to narrow the gap between men and women observed that wage discrimination between men and women still prevailed in certain sectors like agriculture and unorganized industries¹³³. The Committee on status of women in India also strongly recommended legislative action in this regard to provide for equal pay for equal work. Hon'ble Members of this August House have on several occasions expressed their feelings on this matter and have urged immediate and effective remedial action. This matter was discussed at the 25th session of the Labour Ministers conference held in September, 1974. It was unanimously agreed that the state which had not so far implemented fully the ILO Convention, both in letter and spirit, should do so by taking appropriate measure to fix wages according to occupations with in a period of three months but not later their six months. It was also suggested that statutory provision be made to prevent bipartite agreements fixing different wage rates for men and women workers¹³⁴.

To give effect to the constitutional provision, as well as to ensure stricter conformity to the I.L.O convention, the Equal Remuneration Ordinance, 1975, was promulgated by the President on the 26th September, 1975. It was a much needed and overdue measure, designed to benefit a large number of women labour, and it was felt that any delay in promulgating the ordinance would affect adversely the interest of women workers. It was also felt that it would be in the fitness of things to bring forward this measure to implement the provisions of

132. RSD, 12 Jan, 1976, p. 154.

133. Supra Note 131 at. p. 171

134. Supra note 126 at. pp. 154-155.

Article 39 of the constitution in the year 1975 which was being celebrated as the International Women's year¹³⁵.

The salient features of the Bill are –

- (i) The Bill provides for the payment of equal remuneration to men and women workers for the same work or work of similar nature. This stipulation would have effect notwithstanding anything inconsistent in any existing law, award, agreement or contract of service. Where the rates of remuneration for the same work or similar nature of work are different on the ground of sex, the higher or the highest of such rates shall be payable to men and women worker.
- (ii) No employer shall, while making the recruitment for the same work or work of similar nature, make any discrimination against women except where the employment of women in such work is prohibited or restricted by any law, such as mines.
- (iii) The Bill also provides for the setting up of one or more advisory committee by the appropriate Government for promoting employment opportunities for women.
- (iv) Provision is made for the appointment of authorities for hearing and deciding claims and complaints, appellate authorities for hearing appeals and inspectors for the purpose of making investigations.
- (v) Contravention of any provision of the Act shall be punishable with fine which may extend upto Rs. 5000.

Shri Sanat Kumar Raha, a member of parliament from the West Bengal has put his view about the effective implementation of the Equal Remuneration Act, in the following words.

“This is a piece of progressive legislation. I call it pious because I apprehend that there will be no implementation. Since, it is a progressive legislation, I welcome it and hail it. It is an overdue measure as stated by the Minister. If a progressive measure is not implemented in time, it provokes only reaction resulting in further complications in our society. If this progressive measure is not given

135. *Supra* Note 131at. pp. 171-172.

effect to, reaction is always to take advantage of it. I apprehended that this Bill will provoke reaction and there will be entrenchment of women already working in the fields and factories just as the share croppers in the West Bengal were retrenched to fight the share cropping legislation. It is a serious matter. I mention it because if this Bill is not implemented seriously, then I apprehend that those women who are working at present in factories and fields will be retrenched without delay¹³⁶. The Hon'ble Member of Parliament finally urged upon the Government that in the field of organized factories, from the day the Bill is passed, the women workers will be retrenched, anyhow and on any plea. Has the Government any vigilance machinery to check that from this day they will not be retrenched, and if they be retrenched, immediately the offender, the employer, the factory owner or the director will be called in and punished¹³⁷.

Shrimati Sumitra G. Kulkarni, a member of upper house expresses his disappointment on the delay of the Equal Remuneration Bill, and said....

"I congratulate not only the Minister but also the Prime Minister who could think of it, i.e. use of ordinance for a simple thing, obviously a simple thing but neglected for 28 years. I would like to submit that we are happy that there was the International Women's Year, but that is not very relevant to the culture of this country, nor was it pertinent, because without any such year women in India were recognized, there were people who were espousing the cause of women. In fact, in our constitution, our founding fathers of the Constitution, vide Article 39 (d) said that the citizens, men and women equally have the right to adequate means of livelihood. So, as long as 26 years ago, the founding

136. RSD, 12 Jan, 1976, p. 156.

137. Id. at. pp. 160-161.

fathers of the constitution had said that men and women should be paid equally and adequate wage. So it is not as if that only the International Women's Year should have given this spurt of thought and such a brilliant idea. It was mooted 26 years ago. Only we neglected it so far. The only question is, why it delayed so far?¹³⁸

On the long delay of the non-controversial Bill, i.e. Equal Remuneration Bill, *H.S. Naraiiah* a member of Rajya Sabha has said....

"It has been long delayed because, 28 years ago, we gave unto ourselves a constitution which declared that all distinction based on sex should stand abolished and yet we could not bring forward this Bill. It is also long delayed in the sense that 17 years ago we signed the ILO convention which also declared that there should be equal pay for equal work for both men and women. Even then we could not bring forward this Bill or implement that convention. It is somewhere in 1975, as a poor token of gift during the International Women's Year, that we promulgated an ordinance on which we are now debating and which we are going to place on the statute Book of our land. Even then, this Bill contemplates that it is not likely to come into force immediately on being passed as an enactment. It is likely to be postponed by another three years and may be applied to such industries and such places as the central Government may choose to apply as and when it is pleased to do so. He further suggest that a scheme of guaranteed employment also must be formulated to see that these women, whose employment potential would face competition from the male workers, are not excluded from employment in the future. This aspect is not contemplated in this Bill. He again suggest to the labour Minister that he might consider this aspect. And to the extent to which this Bill is going to better the lot, the economic lot, of these poor, landless, siteless,

138. Id. at. p. 162.

houseless, employment less, workers in the rural area. It is a step in the right direction and it is also in the direction of implementation of the 20-point economic programme which our Prime Minister has enunciated and to the extent to which the 20-point economic programme is going to benefit the workers and is going to improve the lot of these women, workers, coupled with the enactment of this legislation, and also appeal to the labour Minister to see that some kind of employment guarantee and some recruitment policy and some scheme of recruiting them in sufficient number also tagged on to the implementation of this measure"¹³⁹.

S.P. Bhattacharyya, member of Lok Sabha express his feeling on the Equal Remuneration Bill, in the following words....

"The ordinance was passed during the International Women's Year. It carries on our tradition, but the Bill itself to my mind is something timid and halting." Firstly, it will be implemented within three years of its passing. Why so much time? Again, we have got the Advisory Committee, inspectors etc but what about the people, the men and women to be employed? How are you going to take their cooperation? Again, there is large number of women working in the rural areas, but nothing is mentioned in the Bill about them. I think only the industrial area will be affected by this Bill, not the entire country. In our country 30, 000 women workers in the jute industry have been retrenched and they are not getting work. In the plantation, in Tea Gardens, women workers are working better than men, but are getting less than men. When the question was raised by the women representatives, they were told by the employers that it was a question

139. *Id.* at. pp. 170-171.

of prestige and that the men should get more than the women. Such things are going on”¹⁴⁰

S.P. Bhattacharya again pointed out in the Lok Sabha that the main question is that you must have the cooperation of the people who are asking for employment. You must have their support; they must have some right to decide. Otherwise things will not be effective. The question is not so much of giving equal wages for men and women for equal work. But the main question in our country is how to get work. If there are ten vacancies, there will be thousands of applications. This happening in all the big towns. You know how the things are going on where is the chance to get employment? If I do not get employment, where is the question of getting some wages? This is the main problem which our country is facing. As a result of these things, women are compelled to prostitution to earn their livelihood in big cities¹⁴¹. *Bimla Randhiva* gave a report that a Rajasthan tribal girl, after her marriage, had to come to Delhi earn as a prostitute to pay money back to the money lender. This is the condition in our country. It is not a socialist base. But I think, we are to free our country from the clutches of big money-lenders¹⁴². I have said many times on the floor of the house that “only 10 per cent of the families in the rural area are controlling 66 per cent of the product of the rural area. These are known things”¹⁴³. Hon’ble member express his inner feeling on the worries of the people of India and said that we can free our motherland from their clutches and we can create conditions for the employment of our men and women throughout the country. We can solve the worries of our people. We can make the equal remuneration for men and women

140. *Supra* Note 131 at. pp. 172-173.

141. *Id.* at. pp. 173-174.

142. *Id.* at. pp. 134-175

143. *Id.* at. p. 175

guaranteed. But for that, proper conditions must be created and then only the purpose of the Bill will be served¹⁴⁴.

On the existing inequality and discriminatory behaviour of Equal Remuneration Bill, *Srimati Roza Deshpande* has said.....

“There was a time when women was really equal to men and that in the primitive society, but as feudal relations came into existence, as the production relations changed and as the state power came into existence and along with that this exploited section, specially in our country because of the caste system women really became a slave of men and of the society¹⁴⁵.

I am really very sorry about one part of this Bill. There are approximately 264 million women in this country. Hardly 31.5 million are working women and out of that 15.8 million are agricultural workers and 9.3 million are cultivators. We are excluding these women from the Bill. How are we going to take care of them? Have we thought about them? What the number of women you are covering? It is only two million, who are in the organized sector. It means that this Bill will be covering only 2 million women out of the 31 million who are supposed to be working women. And there are four million women working in the unorganized sector. How are we going to protect them? All the jobs women do at present are unskilled and semi-skilled that is all they can reach. We have suggested a number of amendments. If you genuinely want to give equal wages to the women, then you have to think of covering the agricultural labour also. If you are going to cover only two million women, I am really very sorry. As I said you should try to the other section of women also.”

144. Ibid.

145. Id. at. p. 180.

Apart from the question of equal remuneration, you should be able to give vocational training to the women so that they can come in competition and they can become fit for the job. For instance, in the textile industry when in the reeling and roving department, new machines were introduced, women were retrenched on the pretext that they cannot work on these machines. I am in the favour of fixing a certain percentage of women workers in certain industries where they are working now. You can force the employees to comply a certain percentage of women, excluding areas where there employment is prohibited. Employees should be forced to send them for further training as otherwise under the pretext that they are not trained, though certain jobs would be earmarked for the women, we will not be able to achieve the objects of the Bill. There is going to be a possibility that after passing of the Bill, a large number of women are going to be retrenched under this or that pretext¹⁴⁶.

He further pointed out that a certain percentage of women are employed in all industries. For instance, you will see the number of women employed in the textile, jute and plantation industries has gone down. Still, in the plantation industry women are not paid equal wages and unless we do that because 81 per cent of the rural women are illiterate and unless you coordinate this action of giving equal remuneration to women and at the same time, provide them with employment by forcing the employer to employ women upto a certain percentage, I hope our Minister accepts the amendments we have moved¹⁴⁷.

K. Mayalhevar, a member of Lok Sabha extending support to the extent of 50 percent and 50 per cent oppose it. My opinion is,

146. Id. at. pp. 181-182.

147. Id. at. p. 183

Mr. Reddy (Labour Minister) you have divided women into two different sectors rural women and urban women, in other words I may say Industrial either by the British Government or women and the Rural Agricultural women including women in plantation.¹⁴⁸ He submitted certain amendment to the Bill before the labour Minister in the following words.....

“In this Bill we are discriminating over natural law, natural justice and common law. May I request the Government to protect the interest of rural working class in India? India's vital economy is the rural economy. 75 per cent of the rural working women have been neglected. They have not been given protection in Bill protection is being given to 20 per cent of the working class in the urban/town areas. They are with no protection either by the British Government or by this Government. In the 20-point programme the rural people should help in this regard. The amendment should be accepted into and this must extend to workers of plantations, agricultural, *bidi* workers etc. as submitted by some Hon'ble members of the house. This Bill will have meaning only if we extend it to rural women working in the agricultural field etc.”¹⁴⁹

Shrimati Bhargavi Thankappan, as a member of parliament said:

“I am really pained to see that the Government has taken 27 long years to realize the fact that women workers who are working in farms, factories and plantation etc, are not getting equal wage for equal work. Even I do not know whether there is any provision in this Bill to bring the workers in the agricultural sector within its purview. Hon'ble member further said that I doubt very much whether at the stage of implementation the same amount of zeal will be displayed by the

148. Id. at. p. 186.

149. Id. at. p. 187.

Government. The reason is that although the entire working class has supported this measure the employers I am sure, will try all that they can subvert it. For example, in the cashew industry a large number of women workers were retrenched when the law was passed to provide maternity benefit to them, since the employers did not want to give this benefit. Not only that the employers will try not to recruit sufficient number of women workers in future only, because of this reason that they should be paid equally. Similarly, the women workers working in tea plantations, coffee plantations, bidi, and match industries are not even getting half as much as the male workers are getting. The Bill itself says that the Government will require some time to collect the relevant data before implementation of the Bill. I would like to ask the Government whether there was not time enough to do this work since the promulgation of ordinance. Three years are too a long period. This gives rise to a suspicion in mind that this Bill will not be implemented with the zeal with which it should be done. I hope that the Government will implement it immediately after the passing of this Act with all vigour.¹⁵⁰

Shri M. Kalthamulhu a member of Lok Sabha said:

“The women workers in the agriculture sector have been completely left out in this Bill. Agriculture remains the major activity of the women in our country. According to the 1971 census, 80 percent of the women workers are found in agriculture.”¹⁵¹

On 30th January, 1976 *Shri S.M. Banerjee*, a member of parliament from Kanpur said in respect of construction workers in the following words.

150. Id. at. pp. 196-197.

151. Id. at. p. 203.

"I would like to invite the kind attention of the Hon'ble Minister about the construction workers. These *Construction workers* throughout the country are not covered under any Act, whether men and women. They do not get gratuity, there is no provident fund for them. This construction worker should be brought under any legislation. They are always paid less. After passing of the Bill, these construction contractors have decided to employ only men, not women. They say, men will do heavy work. These construction workers should be protected, and what about bidi workers, the entire bidi industry is a cottage industry. It is run by women, by widows, by young children, by small girls. What will be their fate? What salary will they get? Their interests should also be protected. Another area of concern is that of contract labour. These people are exploited to the hilt. I would like to know from the Hon'ble Minister, apart from this legislation, whether there will be any other law for them"¹⁵².

Mr. Raghunatha Reddy Hon'ble Labour Minister said in the respect of the Equal Remuneration Bill in the following words.

"I would like to draw the attention of the house to the fact that the labour Minister's Conference had already taken a decision to apply the provisions of this Bill to all the occupations governed under the schedule of the minimum wages Act. The Minimum Wages Act deals with agriculture. That is why the provisions of this Bill would also be made applicable as soon as we hear from the various state Governments with regard to this Bill. The provisions of this Bill would be made applicable to agricultural occupations and agricultural establishments. If there is any difficulty that might arise, which the Hon'ble Minister seems to have in mind, certainly steps will be taken to remedy it. With respect to advisory committee we have put the

152. *Id.* at. pp. 218-219.

minimum requirement which can't be less than 50 per cent. It can be 100 per cent. There is no bar"¹⁵³.

With regard to the machinery, the idea is that even without resorting to the courts, these matters must be settled on the spot. The Inspectors and concerned authorities will have to deal with the situation. Further, it is the trade unions which will have to take a lot of interest in this matter, in getting this provision implemented. A question has been raised as to why we have taken three years for implementation. The Hon'ble members know how difficult it is to get the various decisions under the Minimum Wage Act, implemented in various establishments and undertakings. One thing is to take a decision and another thing is to get the decisions implemented we should see that the machinery is available and the implementation process is speeded up. In such a case we can go head by extending all the provisions of this Act to various establishments, employments undertakings and occupations governed under Minimum Wages Act and various other things like extending the provisions of ordinance to plantations, local authorities Central and State Governments, hospitals, nursing homes, dispensaries, etc. We have put three years only by way of abundant caution; may be within one year the provisions of this Bill will be applied to all the establishments and undertakings¹⁵⁴. While some other advanced countries have not given women the right to vote. As soon as we became independent, we gave equal right to women in all political matters. It is our duty to extend the equality before law not merely in the form but in substance. Therefore, this Bill has been brought forward in accordance with the provisions of the Constitution and ILO convention¹⁵⁵. This is one of the historic Bills that

153. Id. at. pp. 199-200.

154. Id. at. p. 200

155. Id. at. pp. 200-201.

the country has passed. Even some of the most advanced countries could not provided by legislation equality between men and women in terms of equal remuneration for the same or similar nature of work¹⁵⁶.

(c) Equal Remuneration Act, 1976: A Socio-Legal Approach

Equal pay for men and women for the equal work is a vital subject of great concern to society in general and employees in particular, a disparity in wage payment leads to unrest and discontent.¹⁵⁷ Though labour welfare enactments have provided various protections, safeguards and benefits to working women in our country. There was an emergent need to give more protection to female workers who are discriminated as regards employment and wages¹⁵⁸. The wages of women have traditionally tended to lag behind those of men except in few cases. Moreover, the net earnings of the women have traditionally tended to lag behind those of men except in few cases. Moreover, the net earnings of the women invariably happen to be lower than those of men. Women all over the world, had till recently been very much inarticulate and were prepared to accept lower wages even when they were employed on the same jobs as men¹⁵⁹. Even in the economically and socially advanced countries while remarkable progress has been made, discrimination still exist. The principle of equal value has not been always fully implemented. In India, in the initial stages when legislation for the protection of workers was hardly thought of, factory owner taking advantage of the backwardness and social handicaps of the poor classes, recruited women on a large scale at lower wages and made them work under inhuman condition.

156. RSD 12 Jan, 1976, p. 178

157. Suresh C. Srivastava, "Equal Remuneration for Men and Women", JILI, (1990), p. 82.

158. V.G. Goswami, 'Labour & Industrial Laws', 2008, p. 863.

159. Miss M.S. Shah – Women in Employment, Study prepared by Labour Bureau., Government of India, 6th June, 1964, Wages & Employment of Women in India, L.L.J., February 1975, p. 167.

With the gradual decay of the joint family concept, the unfortunate widows, the dependent and uneducated women began to seek employment in the agriculture and allied industries. Plantations, Mining, Building and construction industries also provided employment to such women. Women were employed in large numbers on lesser wages and exploited by the employers because they were aware of the circumstance under which they had come to seek employment. The women accepted these low wages to keep their body and soul together. There was a clear discrimination in the wages paid to women. They were taken on labour jobs carrying lesser wages and there was no avenue of promotion to them nor protection or security of employment¹⁶⁰.

In a developing country like India, the income, by and large, is low but social conventions weigh against employment of women. These are reasons, why the employment of women has not been up to the mark.

Due to labour surplus the unemployment and underemployment problems, many men are available, hence, the problem of participation of women, economic activity become serious. Secondly, technological changes, fixation of minimum work load and standardization of wages, rationalization and mechanization of schemes and certain occupations being found hazardous, they have necessitated retrenchment of women workers. The economic reasons involving additional cost is an impediment to women employment. Some employers recruit unmarried women only, on condition to resign their post on getting married. This has been discriminatory, unfair and unjust¹⁶¹.

160. Mis D'Souza, 'Status of Women in Industry', cited by M.S. Shah, loc cit, 167.

161. M.S. Shah "Wages and Employment of Women in India", I.L.J., Feb., 1975, p. 169.

Several conventions have been evolved by the I.L.O. to provide protection to employed women. Ironically, the relatively high cost of employed women has proved a hurdle to the growth of women employment. Employers are reluctant to employ women and also unwilling to pay them equal wages. A number of I.L.O. convention have been ratified by India and some of these though not ratified have been accepted in principle. The I.L.O. convention No. 111 regarding discrimination in Employment and occupation, 1958 has been ratified. The principle has also been incorporated in the constitution of India. The directive principle of state policy, Article 39(a) states that the citizens, men and women, equally, have the right to an adequate means of livelihood. Not only this, but it can be claimed as a fundamental right as the right to equality as per Article 16(2) makes a specific mention that “no citizen shall on grounds only of sex be ineligible for, or discriminated against in respect of any employment or office under the state”¹⁶².

The principle is also contained in the Constitution of India as directive principles of state policy. Article 39(d), “that there is equal pay for equal work for both men and women”. The legislative provisions of Minimum Wages Act, 1948, do not permit differentiation in minimum rates of wages on the ground of sex. However, in almost all the industries, such as, weeding, transplanting agricultural operations, coal mining industry, plantation, etc. there is discrimination in wages¹⁶³. There are no ready-made solutions to the problem. Even the providing facilities for training and guidance vocations and careers, by implementation and effective enforcement of labour laws and industrial awards, by undertaking job evaluation or job appraisal programmes and by discarding traditional attitudes, the women can be assured of

162. *Supra* Note 158 at. pp. 863-864.

163. *Id.* at. p. 864.

justice. There is a need to fight against discrimination regarding equal pay, equal employment opportunities, for promotions, for occupying higher positions and for leadership to society as was visualize by Mahatma Gandhi¹⁶⁴.

A National Committee, with the prime Minister as its Chairman was set up to ensure more effective implementation of the programmes for a better deal for women in the country. Similar state levels Committee are to be headed by the Chief Ministers. Prof. N. Hasan, who was winding up the discussion on the report of the Committee on the status of women in India also said, the Equal Remuneration Act in favour women and the Minimum wages Act would be extended to other area in a phased manner¹⁶⁵.

Equal pay for work of equal value has been a slogan of the women movement. Equal pay laws, therefore, usually deal with sex-based discrimination in the pay scales of men and women doing the same or equal work in the same organization. For example, the Equal Remuneration Act, 1976 provides for payment of equal remuneration to men and women workers and is meant to prevent discrimination on the ground of sex against women in the matter of employment, when the same principle is sought to be extended to compare pay scales in one organization with pay scales in another organization, although between employees doing comparable work, the stretching of the doctrine, if at all it is done, must be done with caution lest the doctrine shapes. Many ingredients go into the shaping of the wage structure in any organization. Historically it may have been shaped by negotiated settlements with employees unions or through industrial adjudication. It may have been revised or reshaped with the help of expert

164. Prof. M.S. Shah, Loc. Cit. p. 184.

165. The Pioneer dated 28th May, 1976, p.1.

committee. The economic capability of the employer also plays a crucial part in it, as also its capacity to expend business or earn more profits. If the employing organization functions in a competitive area, it may, if it is economically strong, offer higher wages to the better qualified.¹⁶⁶ A simplistic approach, granting higher remuneration to other workers in other organizations because another organization has granted them, may lead to undesirable results. Even within the same organization, when the differential wage structure is based on similar consideration, the application of the doctrine would be fraught with danger, and may seriously affect the efficiency, and at times, even the functioning of the organization. The doctrine is designed to correct irrational and inexplicable pay differentiation which can be looked upon as discrimination against an employees or a given set of employees. It is easier to identify such discriminated groups when the discriminated group is sex-based (women) or colour based (Blacks in the USA) or caste based (Scheduled Castes etc), and more difficult to identify in other cases. But unless there is such identifiable discrimination, the doctrine should not be applied. Mere difference is not discrimination¹⁶⁷.

In furtherance of aims and objectives of Equal Remuneration, The Equal Remuneration Ordinance was promulgated in 1975 to give effect to the constitutional provisions and I.L.O. Convention, 1951 (NO.100) in the International Women Year. The ordinance was replaced by the Equal Remuneration Act, 1976 seeking to provide for the payment of equal remuneration to men and women workers and for the prevention of discrimination on the ground of sex, against women in the matter of employment and for other matter connected with. The employer is under duty to pay equal remuneration to men and women workers for the same work or work of a similar nature as well

166. Supra Note 158 at. p. 865

167. Id. at pp. 865-866.

as he shall not discriminate while making recruitment, promotion, training or transfer. It would be just and proper that this Act may be extended to maximum possible establishments and employments with a view to provide fair and just treatment to women worker. Thus, the Act embraces the philosophy of equal pay for equal work without discrimination on the basis of sex.

The researcher seeks to examine how for the principle of equal remuneration for men and women has been applied in India.

(d) Constitutional Commitments on Status of Women

Discrimination of Individuals or groups of individuals cannot exist in a civilized society – a society which believes in human rights and dignity of individuals. The first international treaty the Charter of the United Nations Organisation expressed in its preamble a faith in “the dignity and worth of human person” as well as in “the equal rights of men and women”. It declared its determination to eliminate all forms of discrimination in order “to promote social progress and better standards of life”. However, more affirmation and declarations do not bring about a change. It requires firm’s determination to break the citadel of male dominance and change customs and traditions rooted in the belief of women being inferior and their contribution to the national economy being marginal.

Member states which had enthusiastically resolved to eliminate the prevalent inequality between men and women dragged their feet when it came to implementing the removal of discrimination through legislation and executive action. The United Nation in its preamble to the Declaration on the Elimination of Discrimination against women, it expressed its concern about the continued discrimination against women and reiterated the fact that this was “incompatible with the human dignity and with the welfare of the family and of the society.”

It also drew attention to the fact that it was an obstacle to the full and complete development of a country.¹⁶⁸

Free India, like the United Nations, in its first important legislation the constitution declared its faith in the equality of men and women as a pre-condition to ushering in a society where there would be justice, social, economic and political for all. It affirmed not only to bring about equality of status but also provide for equality of opportunity for women. The policy makers realized that equality of status was meaningless unless there could also be participation of women in the national economy.¹⁶⁹

The constitution of India in its attempt to build an egalitarian, socialistic and secular ideology enumerated into its principles of equality, liberty and justice proclaimed in the Declaration of Human Rights.¹⁷⁰

The preamble to the Constitution of India seeks to secure to all its citizens including women, justice social, economic and political, liberty of thought, expression, belief, faith and worship, equality of status and opportunity and promote fraternity assuring dignity of the individual for all its citizens including women. The philosophy of the constitution is enshrined in the fundamental rights and directive principle of state policy. Among the fundamental rights, article 14 guarantees "equality before the law and equal protection of laws within the territory of India". Article 15 prohibits discrimination on grounds, *inter alia* of sex. Article 15(3) of the Constitution empowers the state to make, any

168. Lotika Sarkar "Status of Women and Law as an Instrument of Social Change", K.L.T. (1982), p. 262.

169. This is a global phenomenon and was referred to by the UN Commission on the Status of Women in its 29th Session 1982 as follows: "The deep rooted influence of traditional social norms and practices still persist in some countries perpetuating stereotyped attitude about the discriminating behaviour towards women."

170. *Supra* Note 157 at pp. 83-84.

special provision in favour of women. Article 16 guarantees equality of opportunity in matters of public employment. While article 16 (1) ensures equality of opportunity for all citizens (including women) in matters relating to employment or appointment to any office under the state, article 16(2) prohibits discrimination in respect of any employment or office under the state on the ground, *inter alia*, of sex.¹⁷¹

The general statements laid down in the preamble have been amplified and elaborated in the constitution.¹⁷² The state have been directed “to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political shall inform all the institution of national life.¹⁷³ Further, article 39(d) of the constitution of India requires it to strive for securing equal pay for equal work of both men and women.

It will be seen from above mentioned fact that “equal pay for equal work” though not expressly declared to be fundamental right but certainly a constitutional goal, set out by the Constitution to be achieved by labour and other legislation in India. The widespread poverty, illiteracy and unemployment are major obstacles to the practical achievement of this goal in India.

(e) Provisions of Equal Remuneration Act, 1976: A Lego Institutional Analysis

The Indian Constitution expressly declares the principle of equality before law and the equal protection of laws within the territory of India. However, the equal pay for equal work is not declared as a fundamental right. Directive Principles of State Policy contained in Article 39(d) envisage that the State shall direct its policy to secure that

171. Randhir Singh Vs. Union of India, AIR 1982 SC 879, cf Kishori Mohanlal Bakshi vs. Union of India, AIR 1962 SC 1139, where the Supreme Court held that equal pay for equal work was an abstract doctrine and had nothing to do with Article 14.

172. Part IV. Deals with directive principles of state policy

173. Art. 38, Constitution of India

there is equal pay for equal work for both men and women. This has assumed the status of a fundamental right in service jurisprudence, having regard to the constitutional mandate of equality in Articles 14 and 16 of the Constitution. The Supreme Court has zealously enforced the fundamental right to equal pay for equal work in effectuating the constitutional goal of equality and social justice.¹⁷⁴

To give effect to the aforesaid constitutional provisions, the President promulgated on the 26th September, 1975, the Equal Remuneration Ordinance, 1975, so that the provisions of Article 39 could be implemented in the year which was being celebrated as the International Women's Year. The Ordinance provided for payment of equal remuneration to men and women workers for the same work or work of a similar nature and for the prevention of discrimination on grounds of sex. The Ordinance ensured that there would be no discrimination against recruitment of women and provided for setting up of Advisory Committee to promote employment opportunities for women¹⁷⁵.

The Equal Remuneration Act was enacted in 1976 replacing the ordinance with the object, as stated in its Preamble, "to provide for the payment of equal remuneration to men and women workers and for the prevention of discrimination on the ground of sex, against the women, in the matter of employment and for the matters connected therewith or incidental thereto."

Section 2 of the Act provides that it shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint and different dates may be appointed for different establishment or employments.

174. *Grih Kalyankendra Workers Union v. Union of India* AIR 1991 SC 1173.

175. SOR Gazette of India 6-1-1976, Part II, Section 2, extraordinary page 120.

Section 3 of the Act provides that the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law or in terms of any award, agreement or contract of service, whether made before or after the commencement of this Act, or in any instrument having effect under any law for the time being in force.

In *Mackinnon Mackenzie & Co. Ltd. V Andrey D' Cousta*,¹⁷⁶ it was held by the Supreme Court that the management cannot rely on any settlement arrived at between the parties. The settlement has to yield in favour of the provisions of the Act. It was also held that the financial capacity of the employers has nothing to do with the application of the Act.

Section 15 further provides that nothing in this Act shall apply:

- (a) to cases affecting the terms and conditions of woman's employment in complying with the requirements of any law giving special treatment to women, or
- (b) to any special treatment accorded to women in connection with:
 - (i) the birth or expected birth of a child, or
 - (ii) the terms and conditions relating to retirement, marriage or death or to any provision made in connection with the retirement, marriage or death.

Definitions (Section 2)

The important definitions given in the Act are as under:

(i) Appropriate Government [Section 2(a)]

"Appropriate Government" means:

- (i) in relation to any employment carried on by or under the authority of the Central Government or a railway administration, or in relation to a banking company, a mine, oil-field or major port or any corporation established

176. (1978) 71 AIR 415 (SC)

by or under a Central Act, the Central Government, and in relation to any other employment, the State Government.

(ii) Remuneration [Section 2(g)]

“Remuneration” means the basic wage or salary and any additional emoluments whatsoever payable, either in cash or in kind to a person employed in respect of employment or work done in such employment, if the terms of the contract of the employment, expressed or implied, were fulfilled.

(iii) Same work or work of similar nature [Section 2(h)]

“Same work or work of a similar nature” means work in respect of which the skill, effort and responsibility required are the same, when performed under similar working conditions, by a man or a woman and the differences. If any, between the skill, effort and responsibility required of a man and those required of a woman are not of a practical importance in relation to the terms and conditions of employment.

In *Mackinnon Mackenzie & Co. Ltd. vs. Andrey D' Cousta*¹⁷⁷ it was held by the Supreme Court that female and male stenographers perform identical duties and are entitled to equal pay.

Duties of employers

(i) Duty to pay equal remuneration to men and women for same work or work of similar nature (Section 4)

Section 4 provides that no employer shall pay to any worker, employed by him in an establishment or employment, remuneration, whether payable in cash or kind, at rates less favourable than those at which remuneration is paid by him to the worker of the opposite sex in such establishment or employment for performing the same work or work of a similar nature.

177. Ibid.

It is also provided that no employer shall reduce the rate of wages for the purpose of complying with the aforesaid provisions.

In order to grant relief under section 4, employee should establish that the remuneration paid by the employer, whether payable in cash or kind, is being paid at rates less favourable than those at which remuneration is paid by him to the employees of the opposite sex in such establishment for performing the same work or work of a similar nature.

In deciding whether the work is same or broadly same, the authority should take a broad view, next in ascertaining whether any differences are of practical importance, the authority should take an equally broad approach, for the very concept of similar work implies differences in details, but these should not defeat a claim for equality on trivial grounds.

(ii) No Discrimination to be made while recruiting men and women workers (Section 5)

Section 5 provides that on and from commencement of this Act, no employer shall, while making recruitment for the same work or work of a similar nature, or in any condition of service subsequent to recruitment such as promotion, training or transfer make any discrimination against women, except where the employment of women in such work is prohibited or restricted by or under any law for the time being in force.

(iii) Duty to maintain register (Section 8)

Section 8 prescribes that every employer shall maintain such registers and other documents relating to workers employed by him. This register should be maintained in Form A of the Equal Remuneration Rules, 1976.

Advisory Committee (Section 6)

Section 6 provides that the appropriate Government shall constitute one or more Advisory Committee to advise it with regard to the extent to which women may be employed in such establishments, as the Central Government by notification specifies in this behalf.

Every Advisory Committee shall consist of not less than ten persons, to be nominated by appropriate Government, of which one-half shall be women. The Advisory Committee shall regulate its own procedure.

The composition of the Committee, the term of office of members, their allowances and disqualification etc. are prescribed in the Central Advisory Committee on Equal Remuneration Rules, 1991.

(i) Advice to the Government

In rendering advice to the appropriate Government, the Advisory Committee shall take regard to the following:

- (i) Number of women employed in the concerned establishment or employment.
- (ii) The nature of work.
- (iii) The hours of work,
- (iv) The suitability of women for employment,
- (v) The need for providing increasing employment and opportunity for women, including part-time employment and
- (vi) Such other relevant factors, as the committee may think fit.

Powers to the appropriate Government

The following powers of the appropriate Government are provided in the Act:

(i) Power to appoint authority (Section 7)

Section 7 provides that the officer not below the rank of Labour Officer shall be the Authority for the purpose of hearing and deciding:

- (a) Complaints with regard to contravention of any provisions of the Act.
- (b) Claims arising out of non-payment of wages at equal rates to men and women workers for the same work or work of similar nature.

The manner of lodging complaints and claims is prescribed in the Equal Remuneration Rules, 1976.

The local limits of such authorities may also be defined. If a complaint is lodged to the authority, he will give an opportunity of being heard to the employer and employee, and after such inquiry as may consider necessary, direct;

- (a) to pay additional amount payable to the worker, if the claim arising out of non-payment of wages at equal rates;
- (b) the employer to take adequate steps to ensure non-contravention of any provision of the Act.

Every Authority appointed under section 7 (i), shall have all powers of a Civil Court under the Code of Civil Procedure, 1908, for the purpose of taking evidence and of enforcing the attendance of witnesses and compelling the production of documents, and every such Authority shall be deemed to be a Civil Court for all practical purposes of section 195 of the Code of Criminal Procedure, 1973.

(ii) Power to issue declaration (Section 16)

Section 16 provides that where the appropriate Government is, on consideration of all the circumstances of the case, satisfied that the differences in regard to the remuneration of men and women workers in any establishment or employment is based on a factor other than sex, it may, by notification, make a declaration to that effect, and any act of employer attributable to such a difference shall not be deemed to be contravention of any provision of this Act.

(iii) Power to appoint inspectors (Section 9)

Section 9 empowers the appropriate Government to appoint, by notification, such persons as it may think fit to be Inspectors for the purpose of making an investigation as to whether the provisions of this Act, or the rules made there under, are complied with by the employer, and may also define local limits of such Inspectors.

Every Inspector shall be deemed to be a public servant within the meaning of section 21 of Indian Penal Code.

Section 10(3) provides that, if any person being required so to do, omits or refuses to produce to an Inspector any register or other document or to give any information he shall be punishable with fine, which may extend to five hundred rupees.

Powers of Inspectors

- (a) To enter, at any reasonable time, with such assistance as he thinks fit, any building, factory, premises or vessels;
- (b) To require production of register, muster roll or other documents from the employer and examine such documents from the employer and examine such documents;
- (c) To take evidence of any person on the spot or otherwise, for the purpose of ascertaining the compliance of the provisions of the Act;
- (d) To examine the employer, his agent or servant or any other person found in charge of the establishment;
- (e) To make copies or take extracts from, any register or any other document maintained in relation to the establishment under this Act.

Powers of the Central Government (Sections 13, 14 and 17)

1. Section 13 empowers the Central Government to make rules and notify for carrying out provisions of this Act.
2. Section 14 also empowers the Central Government to give directions to State Government as to the carrying into execution of this Act in the State.

3. Section 17 further empowers the Central Government by notification to remove difficulty, if any. Each such order is required to be laid before each House of Parliament.

Appeal

Any employer or worker having been aggrieved by the order of the Authority may within 30 days of such order prefer an appeal to such Authorities as the appropriate Government may, by notification, specify in this behalf. However, no further appeal shall lie against the order made by such Authorities. However, such Authority may condone delay in preferring appeal for a further period of thirty days if it is satisfied that the appellant is prevented by sufficient cause from preferring the appeal within stipulated period.

Offences and penalties

(i) Penalty for failure to maintain records (Section 10(1))

Section 10(1) provides that an employer shall be punishable with simple imprisonment for a term, which may extend to one month or fine up to ten thousand rupees or both if, being required by or under the Act, so to do he:

- a) Omits or fails to maintain register or other documents in relation to workers employed by him, or
- b) Omits or fails to produce any register or other documents relating to workers employed, or
- c) Omits or refuses to give any evidence or prevents his agent, servant or any other person in charge of the establishment, or
- d) Omits or refuses to give any information.

(ii) Penalty for violation of duties (Section 10(2))

Section 10(2) provides that an employer Shall be punishable with fine which shall not be less than ten thousand rupees or with imprisonment for a term which shall not be less than three months, but may extend up to one year or with both for the first offence, and with

imprisonment which may extend to two years for the second or subsequent offences, if he

- (a) Makes any recruitment in contravention of the provisions of this Act, or
- (b) Makes any payment of remuneration at unequal rates to men and women workers, for the same work or work of a similar nature, or
- (c) Makes any discrimination between men and women workers in contravention of the provision of this Act, or
- (d) Omits or fails to carry out any direction made by the Appropriate Government under section 6.

(iii) Offences by companies (Section 11)

Section 11 provides that where any offence under this Act has been committed by a Company, every person who at the time the offence was committed, was in charge of and was responsible to the company for the conduct of the business of the company, shall be deemed to be guilty of the offence and liable to be proceeded against and punished accordingly.

For the purpose of this section "*Company*" means any body corporate and includes a firm or other association of individuals, and "*Director*", in relation to firm, means a partner in the firm.

(ii) Cognizance and trial of offences (Section 12)

Section 12 restrains any Court inferior to that of a Metropolitan Magistrate or Judicial Magistrate of the First Class from trying offence punishable under this Act.

A Court shall take cognizance as under:

- (a) On its own knowledge or upon a complaint made by the Appropriate Government or an officer authorized by it in this behalf, or

(b) A complaint made by the person aggrieved by the offence or by any recognized welfare institution or organization.

During the last ten years of its existence certain loopholes and lacunae have been noticed.

To overcome these lacunae the Equal Remuneration (Amendment) Act, 1987 was passed by both House of Parliament and received assent of the president on 16th December 1987. According to this amendment courts can take cognizance on the basis of complaints made by recognized organizations notified by the Centre or State Governments. The amendment in the principle Act also plugs certain loopholes and removes the ambiguity of meaning in certain provisions of the Act and makes penalties more stringent.¹⁷⁸

Working of the Act

The Equal Remuneration Act was passed about thirty two years ago but number of violations detected, prosecution launched, and convictions obtained have been extremely small. In fact, almost all the cases have been in the central sector, though most of the employments covered area in the state sectors.

The figures¹⁷⁹ relating to the Central Sector are as follows:

Year	No. of Prosecution	No. of cases disposed of	No. of conviction	No. of acquittal
1982	15	8	8	-
1983	58	25	25	-
1984	167	40	28	2
1985	289	77	76	1
1986	305	203	203	-

178. Supra Note 158 at. p. 85.

179. See, Government of India, Standard Note on the Working of the Equal Remuneration Act, 1976 (unpublished).

Very few state governments, viz, Uttar Pradesh, Orissa, Madhya Pradesh and Himachal Pradesh have for reported cases of violation under the Equal Remuneration Act. One of the reasons appears to be the inadequacy of the inspecting staff. The enforcement staff in the field is burdened with the task of implementing a very large number of Acts, and laws relating to women and children are generally considered to be of low priority.

In order to implement effectively the different Acts pertaining to welfare of women workers, state governments and Union territories were requested to set-up women's cell in their respective states. The State Governments of Andhra Pradesh, Bihar, Gujarat, Madhya Pradesh, Orissa, Karnataka, West Bengal, Uttar Pradesh and Delhi have set-up such cells. In the state of Assam, the functions of the women cell are being looked after by the research cell. In Arunachal Pradesh a women's cell exist under the Directorate of Public instructions. The women's cell set-up in the Ministry of Labour in August 1976 has also been instrumental in implementation of the Equal Remuneration Act, i.e. its extension to various employments industries and examination of the difficulties, if any, point out by the units, industries, and setting up of an advisory committee for the promotion of employment of women under the Equal Remuneration Act and providing secretarial assistance to the committee.¹⁸⁰

Indeed, there is not even a single piece of legislation in India guaranteeing a citizen equal pay for equal work. No state machinery is there to protect the workers right to get equal pay for equal work. Of course, there is Equal Remuneration Act of 1976, which prohibits discrimination on the ground of sex in wages,¹⁸¹ recruitment¹⁸² and

180. *Supra* Note 157 at. p. 86.

181. Section 4 of E.R.Act, 1976, it is the duty of the employer to pay equal remuneration to men and women workers for the same work or work of a similar nature.

other matters related to or incidental to employment. But the Act is insufficient and ineffective. Firstly, it seeks to provide for payment of equal remuneration to male and female workers, but it does not guarantee equal pay for equal work among men. The absence of this specification led to judicial controversy. Secondly, it provides for equal wages for men and women for same or similar work. Similar work¹⁸³ is defined as one in which the skill, effort and responsibility are same. But the Government on subjective satisfaction has the power to declare that difference in remuneration between men and women in a specific establishment is based on a factor other than sex.¹⁸⁴ Moreover, establishing that the work is same or similar is a tough task. For instance, in the construction industry women helper carrying bricks are paid less than male helpers who carry cement bags. There is no logic in the argument that carrying 50 kg of bricks is less strenuous than carrying 50 kg of the cement. But a claim for equal pay could be easily defeated by saying that it is not same or similar work.

That is the stark reality of million of workers in this country. Though legislation on labour abound, a vast majority of the workers are still outside their place. This is because of the bulk of the workforce is concentrated in the unorganized sector or the informal sector and laws by and large cater only to the organized sector.¹⁸⁵ Generally, workers do not invoke the justice to redress their right to get equal pay for equal work due to fear of victimization and poverty. It is submitted that the existence of this pathetic condition is due to lack of effective law and also due to ineffective implementation of existing law.

182. Section 5 of E.R.Act, 1976, no remuneration to be made by the employer while recruiting men and women workers.

183. Section 2 (h) of E.R. Act, 1996.

184. Section 16 at E.R.Act, 1976.

185. The Hindu, July 22, Sunday, 1990, p. 18.

(f) Judicial Activism

The absence of effective legislation on equal pay for equal work has forced the working class to fight in court to get equal pay for equal work. Indeed, the development of the doctrine of equal pay for equal work has depended upon the vagaries of judicial interpretation. The psychology and social values of the judges play an important role in the judicial interpretation and judicial making law.

Equal pay for equal work is one of the Directive Principle of State policy envisaged under Article 39(d) of the Constitution. According to Article 37, the Directive Principle can't be enforceable by any court, yet they shall be fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws.¹⁸⁶

Judiciary has played an active role in enforcing and strengthening the constitutional goal of "equal pay for equal work".

A milestone in the area of implementation of the Equal Remuneration Act was reached with the pronouncement of the Supreme Court decision in *People's Union for Democratic Rights v. Union of India*¹⁸⁷. The court ruled that it "is the principle of equality embodied in Article 14 of the Constitution which finds expression in the provision of the Equal Remuneration Act, 1976."

In *Randhir Singh v. Union of India*¹⁸⁸ construing articles 14 and 16 in the light of the preamble and article 39(d), the Supreme Court held that the principle of "equal pay for equal work" is deducible from them and may be properly applied to cases of unequal scales of pay based on no classification or irrational classification though those drawing different scales of pay do identical work under the same employer.

186. Miss Y. Vishnupriya, "Equal pay for Equal work in India: Myth and Reality", S.C.J.I. Vol.I, Jan-April, (1991), p. 85.

187. (1982) 2 LLJ 454 (SC)

188. AIR 1987 SC 2049

Again in *Bhagwan Dass v. State of Haryana*¹⁸⁹ the Supreme Court was of the view that, (i) persons doing similar work cannot be denied equal pay on the ground that mode of recruitment was different: and (ii) a temporary or casual employee performing the same or similar duties and functions is entitled to the same pay as that of a regular or permanent employee.

A survey of the aforesaid decisions reveals the creative role of judiciary in securing equal pay for equal work to both sexes. Further the court has brought equal remuneration within contours of the fundamental right of equality. However till 1987, it did not lay down the test for determining "same and similar work".

*Mackinnon Mackenzie & Co. Ltd. V. Audrey D' Costa*¹⁹⁰ is the most significant judicial pronouncement on equal remuneration. It has not only made a distinct contribution in formulating the test for determining "same work or work of similar nature" under section 4 of the Equal Remuneration Act, but also reflected the role of judiciary in law making in the arena of equal remuneration.

(i) The factual background

The relevant facts were: Audrey D' Costa (respondent no. 1) was working as confidential lady stenographer attached to the senior executive of M. Mackenzie & Co. Ltd. (hereinafter referred to as management). In addition to this she was also required to do the work of filing, correspondence, etc. The management terminated her services. Thereupon, she instituted a petition before the authority appointed, under the Act contending that she was paid during her service remuneration at a rate less favourable than that given to male stenographers in the establishment for performing the same or similar

189. See also, *Jaipal V. State of Haryana*, AIR 1988 SC 1504.

190. (1987) Lab.I.C 961.

work. She accordingly claimed the difference between the remuneration paid to her and her male counterpart. The management opposed the said claim on three grounds, namely, (i) there was no difference in the pay scale between male and female stenographers; (ii) lady stenographers were not performing the same or similar work to that of male stenographers; and (iii) there was no discrimination on the ground of sex and accordingly no violation of section 4 of the Act.

The authority came to the conclusion that both male and female stenographers were doing the "same work or work of similar nature" under section 2(h). However, it rejected the complaint of Audrey D" Costa in view of the settlement between the management and union. Against this order, an appeal was preferred by respondent no. 1 before the appellate authority constituted under the Act which found that there was a denial of equal remuneration for same or similar work to stenographers of both sexes and, therefore, the management was liable for breach of section 4. Accordingly it directed that the difference in basic pay and dearness allowance between respondent no. 1 and her male counterpart be paid for the stated period. Thereupon the management filed a writ petition in the High Court under article 226 of the Constitution. The single judge affirmed the decision, which on appeal, was reaffirmed by the Division Bench Against this a petition was filed before the Supreme Court under article 136 of the Constitution.

(ii) Area of conflict

The Supreme Court was directly called upon to decide the following main issues:

- (i) How to determine whether the work is of the same or similar nature within the meaning of section 4 of the Act?

- (ii) Whether the difference of pay between male and female workers under a settlement between the management and union attracts section 4 of the Act?
- (iii) What is the scope of sub-section (3) of section 4 and its proviso?
- (iv) Whether financial incapacity of the employer to pay equal remuneration to both sexes is a relevant factor to deny equal remuneration under section 4 of the Act?

(3) Response of the Supreme Court

(i) Formulation of tests

Venkataramiah J (as he then was) speaking for the court, laid down the following tests for determining whether the work is the same or similar in nature:

The Authority should take a broad view...In ascertaining whether any differences are of practical importance, the authority should take an equally broad approach for the very concept of similar work implies differences in details, but these should not defeat a claim for equality on trivial grounds. The authority should look at the duties performed by men and women. Where however both men and women work at inconvenient times, there is no requirement that all those who work e.g. at night shall be paid the same basic rate as all those who work normal day shifts. Discrimination arises only where men and women doing the same or similar kind of work are paid differently. Wherever sex discrimination is alleged, there should be a proper job evaluation before any further enquiry is made.¹⁹¹

Applying the aforesaid tests in the specific facts situation the court held that there was practically no difference between the work done by the confidential lady stenographers and that done by the male counterparts. Accordingly it found no ground to interfere in the decision of the courts below.

The aforesaid tests are of wide import and likely to create difficulty in their uniform application. Thus, if according to the court the authority should take "the broad view" The question arises how

191. Id.at. p.966.

“broad” its approach will be. One may answer it by reference to the second test which suggests that the broad approach should be so that the claim may not be defeated on trivial grounds. But it again leaves it to the authority to decide how it would take into account the interests and value. Thus:

- (a) the authority may make its own analysis of the benefits and disadvantages arising out of the rival claims and then decide whether the work is of the same or similar nature and whether the grounds are trivial or not; or
- (b) the authority could simply adopt a choice which a reasonable man could believe; or
- (c) the authority may rely on some hierarchy of values or norms, presumably derived from the Constitution, or
- (d) the authority should take an overall view of all circumstances, conditions and limitations and then determine the question whether section 4 is violated or not.

Which of the above attitudes of deference the authority adopts might then depend on how much importance it attaches to equal remuneration to both sexes. Further it is required to determine how trivial the grounds are upon which the management tries to escape from the purview of the Equal Remuneration Act.

Finally, the authority must articulate and apply the substantive standards, which process is inevitably involved with that of deciding what degree/deference it attaches to the employer’s action. Just as the court may make a more searching review of various interests involved and the goal to be achieved, the authority too is required to adopt a more exacting and practical approach in order that the goal of providing equal pay for equal work may be preserved without affecting the interests of the society.

(iii) Effect of settlement on payment of equal remuneration to both sexes

Whether the management may deny payment of equal remuneration to both sexes on the ground of settlement arrived at between the management and the union? The court answered the question in the negative in view of the provisions of section 3 of the Act which provide that “the provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law or in the terms of any award, agreement or contract of service, whether made before or after the commencement of the Act, or in any instrument having effect under any law for the time being in force.¹⁹² Accordingly it held that the petitioner cannot rely upon the settlement arrived at between the parties as that has to give way to provision of the Act. This view, it is submitted, is in consonance with the object, scheme and statutory provision of the Act.

(iv) Scope of section 4(3) and its proviso:

Sub-section 3 of section 4 of the Act provides—

Where, in an establishment or employment, the rates of remuneration payable before the commencement of this Act for men and women workers for the same work or a similar nature are different only on the ground of sex, then the higher (in cases where there are only two rates), of such rates shall be the rate at which remuneration shall be payable, on and from such commencement, to such men and women workers:

Provided that nothing in this sub-section shall be deemed, to entitle a worker to the revision of the rate of remuneration payable to him or her with reference to the service rendered by him or her before the commencement of this Act.

192. Id. at p. 967.

The court was called upon to delineate the contours of the aforesaid provision. In this case after the settlement was arrived at there was a common scale for both men and women. However, discrimination was made in the process of placement of the lady stenographers in the given scale of pay which resulted in reduction of pay to them. On these facts it ruled:

The proviso to sub-section (3) of Section (4) comes into operation only where sub-section (3) is applicable. Since there is not different scales of pay in the instant case sub-section (3) of Section 4 of the Act would not be attracted and consequently, the proviso would not be applicable at all. The proviso cannot travel beyond the provision to which it is a proviso.¹⁹³

The court accordingly rejected the contention of the petitioner that the order of the High Court was contrary to the proviso to sub-section (3) of section 4 of the Act.

The aforesaid interpretation shows the concern of the judiciary in assuring equal pay for equal work to both male and female workers and at the same time safeguards the interest of the workers. It reveals the beneficial interpretation keeping in view the constitutional directives for equal pay for equal work.

(v) Financial incapacity to pay equal remuneration: If relevant

It was contended on behalf of the management that the enforcement of the Act would be highly prejudicial to it since it had no capacity to pay equal remuneration to both male and female stenographers. The court rejected this argument and observed:

The Act does not permit the management to pay to a section of its employees doing the same work or a work of similar nature lesser pay contrary to Section 4(1) of the Act only because it is able to pay equal remuneration to all. The applicability of the Act does not depend upon the financial ability of the management to pay equal remuneration as provided by it.¹⁹⁴

193. Ibid.

194. Ibid.

This decision illustrates some of the complexities of judicial review of social legislation. To begin with someone has to identify the benefits and disadvantages of implementing the provisions of the Act. It may be pleaded that in the short run it will serve the interest of females by providing them wages equal to their male counterparts. But in the long run it may lead to non-employment of women workers. However, a critic while commenting on the Supreme Court decision in the *Randhir Singh* case on equal pay charged it with a lack of serious thinking about the disastrous consequences of its ruling. In his view, the goal could be achieved through a gradual and slow process of change of the notion as a whole, not by a decree of the court.¹⁹⁵ This fear is unfounded. It is submitted that if an employer could be allowed to take a plea on the ground of financial incapacity to pay equal remuneration to both male and female workers the majority of employers will be left outside the purview of the Act. However, the researcher feels that the legislature may evolve a policy which may generate employment potentiality of women workers and at the same time assure them equal pay with their male counterpart.

195. See, Ajith Kumar, "Equal Pay for Equal Work", K.L.T. 62 at 63 (1982). See also, J.K. Mittal, "Canal Labour and Equal pay for Equal Work", 28 J.I.L.I. 260-61 (1986).