

CLOSING THE GLOBAL GENDER PAY GAP: SECURING JUSTICE FOR WOMEN'S WORK

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I. INTRODUCTION

For the world's women who earn about 78% of what the world's men make, the right to pay equity represents a way to compel labour market institutions to deliver discrimination-free pay for their work.¹ With two thirds of the world's poor being women, measures which can deliver increases in women's pay to reduce this discrimination are critical to their survival and future prosperity.² While some pay equity progress has been made primarily in developed countries in Canada and Europe, for the most part, existing labour market mechanisms have not made significant progress in remedying this global gender pay gap. Equal pay for work of equal value (also known as "pay equity" or "comparable worth") was recognized as one of the first international labour standards - a principle entrenched in the 1919 ILO founding constitution. Yet at the start of the 21st century, systemic gender-based discrimination in pay remains one of the labour market's most enduring and universal features.³

While there appears to be widespread consensus that closing the global gender pay gap is essential, as demonstrated with ILO equality Conventions 100 and 111 which are among the most widely ratified, pay equity continues to be arguably one of the most violated labour and human rights standards.⁴ Some scholars have argued that pay equity as implemented in North America is not worth the effort given its limited impact and the complexity, costs and delays in its implementation.⁵ Other scholars, including this author, as well as international institutions such as the ILO and the UN argue that pay equity is a fundamental human right of women requiring constant renewal and adaptation to address the diverse and constantly evolving conditions of women's work⁶

¹ See UNIFEM, PROGRESS OF THE WORLD'S WOMEN, 2005, WOMEN, WORK & POVERTY, United Nations, 2005. The term "pay" in this paper is used for ease of reference in this paper to include the remuneration, profit or income which women receive for their work (including benefits and pensions) whether from employment or self-employment. The term "pay equity" incorporate the concept of equal pay for work of equal value and comparable worth, all concepts which require the work women do to be paid for without discrimination based on gender.

² Pat Armstrong and Mary Cornish, *Restructuring Pay Equity for a Restructured Work Force: Canadian Perspectives* GENDER, WORK & ORGANIZATION, Blackwells, Oxford, U.K. Vol.4 No.2, April, 1997.

³ Mary Cornish, Fay Faraday and Veena Verma, *Securing Gender Justice: Challenges Facing International Labour Law*, in John Craig and Michael Lynk, GLOBALIZATION AND THE FUTURE OF LABOUR LAW, Cambridge University Press, 2006.

⁴ Marie-Thérèse Chicha, A COMPARATIVE ANALYSIS OF PROMOTING PAY EQUITY: MODELS AND IMPACTS. WORK IN FREEDOM, International Labour Organization, 2006.

⁵ Judy Fudge and Patricia McDermott, (eds.) JUST WAGES: A FEMINIST ASSESSMENT OF PAY EQUITY, Toronto, University of Toronto Press, 1991; Margaret Hallock, *Pay Equity: the Promise and Practice in North America*, Labour & Industry, 10.2 (Dec.1999): 53 and Nitya Iyer, WORKING THROUGH THE WAGE GAP: REPORT OF THE TASK FORCE ON PAY EQUITY (Commissioned by the British Columbia Government, 2002).

⁶ Armstrong and Cornish, *supra* note 2 and Pat Armstrong, Mary Cornish and Elizabeth Millar, *Pay Equity: Complexity and Contradiction in Legal Rights and Social Processes*, Chapter 7, CHANGING CANADA: POLITICAL ECONOMY AS TRANSFORMATION. HEALTH IN THE WORKPLACE. Montreal, McGill-Queen's University Press, 2003. Edited by Wallace Clement and Leah F. Vosko; Pay Equity Task Force. 2004. PAY EQUITY: A NEW

This article submits that securing this fundamental right for women is one of the most profound challenges for 21st century labour law and policy. Pay equity is a fundamental building block for any sustainable plan to reduce labour market gender discrimination. Pay equity mechanisms must co-exist with and support other equality strategies to create the interrelated and interdependent set of systemic conditions critical to achieving women's economic equality.⁷ Ensuring non-discriminatory outcomes in the labour market is also a hallmark of democratic governance and the ILO "decent work" standard which the world's governments are committed to provide.⁸ Given the complexity of the policy problem, this article provides a human rights and labour law framework for starting to answer the question - how can pay equity "rights" be translated into sustainable increases in women's pay in both developed and developing countries?⁹ Ongoing research and analysis will be necessary to inform and sustain the implementation process.

As a growing proportion of the workforce in both developed and developing countries is not covered by effective or even minimum employment-based social and legal protections, pay equity strategies focused solely on the formal employment sector must be reconsidered and reinvented using a targeted combination of mandatory laws and established norms. Informed by an understanding of the global economic patterns and prejudices which undervalues this work, the traditional workplace governance model which has focused on providing more protection to the work men do to one which recognizes and values without discrimination women's work in its many forms must be established.¹⁰ Based on a data-based mapping of the nature and conditions of women's work, and relying on the empowered voice of organizations and trade unions, gender-sensitive international, regional, national and enterprise level pay equity plans must be developed which provide for multi-layered strategies to mainstream the recognition and valuation of women's work. This will ensure that the specific features of such pay discrimination will be made visible as they vary among the world's regions, from country to country, within economic sectors and among different groups of women who are divided by disadvantaging factors such as class, race, ethnicity, indigenous status,

APPROACH TO A FUNDAMENTAL RIGHT. PAY EQUITY TASK FORCE, Final Report. Ottawa: Pay Equity Task Force; Chicha, *supra* note 4; Jill Rubery, Damian Grimshaw and Hugo Figueiredo, *How to Close the Gender Pay Gap in Europe: Towards the Gender Mainstreaming of Pay Policy*. INDUSTRIAL RELATIONS JOURNAL 36:3, Blackwell Publishing Ltd. 2005; and ILO, Director-General, TIME FOR EQUALITY AT WORK: GLOBAL REPORT UNDER THE FOLLOW-UP TO THE ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK, International Labour Conference 91st Session 2003, Report I(b), Geneva, International Labour Office; and *supra* note 1.

⁷ *Id.*

⁸ ILO, *supra* note 6., TIME FOR EQUALITY.

⁹ This article draws on the unpublished work of the author and other co-authors including Mary Cornish, Engendering Citizenship and Labor Market Regulation: International and Canadian Perspectives, commissioned research paper by the World Bank and presented at the World Bank 5th Gender and Law Conference Law, Institutions and Gender Equality, March 18th-19th, 2003; Mary Cornish and Fay Faraday, Achieving Pay and Employment Equity: for Women: Human Rights and Business/Development Imperatives and Litigating Pay and Employment Equity: Strategic Uses and Limits, research papers commissioned by the New Zealand Government for presentation at the Pay and Employment Equity for Women International Conference convened by the New Zealand National Advisory Council on the Employment of Women, Wellington, New Zealand, June 28-30, 2004, at <http://www.nacew.govt.nz/conference2004/papers.html>.

¹⁰ Cornish, *supra* note 2 and Judy Fudge and Leah Vosko, *Gender Paradoxes and the Rise of Contingent Work Towards a Transformative Political Economy of the Labour Market* in Wallace Clement and Leah Vosko, eds. CHANGING CANADA— POLITICAL ECONOMY AS TRANSFORMATION, (Montreal: McGill-Queens Univ. Press, 2003.

disability, age and religion. By mapping, the burdens women face of reconciling work and family life, and the need to value the unpaid work women do, will come to the foreground.¹¹

Based on a review of the problem posed by pay discrimination, the wide-ranging and pro-active nature of international pay equity obligations and the economic and development imperatives for pay equity, this article proposes a framework for mainstreaming pay equity into labour market governance so that women's work is counted and valued. This article provides a new comprehensive way of framing the pay equity debate and the issues and considerations which should inform the design of pay equity promoting mechanisms for the different areas of women's work. This includes those in precarious employment and self-employment. In the course of this review the article considers some strengths and limitations of existing pay equity approaches along with some ideas for pay equity promoting mechanisms which can start to provide a basic platform for a comprehensive pay equity strategy. Focusing on the pay equity debate also helps to shape this broader dialogue among scholars and policy and decision makers about how best to bring the ILO standard of "decent work" to workers worldwide - specifically the creation of work that is productive in conditions of freedom, equity, security and human dignity.¹²

It is always necessary to factor in the fundamentally political nature of pay equity. Securing pay equity rights for women challenges the power dynamics at the heart of globalization and the privileged position men's work holds. This engages strong and continuing resistance.¹³ As another UN report has stated: "economic systems which value profits often do so at the expense of female labour".¹⁴ Pay equity analysis must expose those who benefit and profit from the current inequitable distribution of globalization's economic dividends and this includes both powerful transnational corporations (TNCs) and also governments who rely on underpaid women's work to deliver poorly funded public services. Gender prejudices reinforced by religious beliefs are also powerful constraints. By increasing economic choices and empowering women, pay equity changes the balance of power in women's homes, places of work and communities. With the poor mostly women, pay equity is also now seen more broadly as part of the overall political struggle to address poverty and promote economic and social rights to ensure a "living wage".¹⁵ A sustainable pay equity mechanism must include a strategy for gaining political support supported by civil society, along with measures to fight back when the backlash occurs.

II. THE PROBLEM: GENDER BASED PAY DISCRIMINATION

A. Occupational Segregation and Low Pay

¹¹ Armstrong & Cornish, *supra* note 2; Cornish et. al. *supra* note 3 and Cornish et al. *supra* note 9.

¹² ILO: A FAIR GLOBALIZATION: THE ROLE OF THE ILO, REPORT OF THE DIRECTOR GENERAL ON THE WORLD COMMISSION ON THE SOCIAL DIMENSION OF GLOBALIZATION, International Labour Conference, 92nd Session, Geneva, 2004 and see <http://www.ilo.org/public/english/decent.htm>.

¹³ Judy Fudge, *The Paradoxes of Pay Equity: Reflections on the Law and the Market in Bell Canada and the Public Service Alliance of Canada* (2000). 12 CANADIAN JOURNAL OF WOMEN AND THE LAW, 313.

¹⁴ United Nations, Preliminary Report Submitted by the Special Rapporteur on Violence Against Women, its Causes and Consequences, E/CN/4/1995/42, 22 November, 1994 and Armstrong and Cornish, *supra* note 2.

¹⁵ Katherine V.W.Stone, *Flexibilization, Globalization and Privatization: Three Challenges to Labour Rights in Our Time*, OSGOOD HALL LAW JOURNAL, 44, 77, 2006 and Stephanie Luce, *The Full Fruits of Our Labour: The Rebirth of the Living Wage Movement*, 43 LABOR HISTORY 401 402-403, 2002.

While there are legitimate arguments about how much of the pay gap represents the undervaluation of women's work, there is no doubt that such undervaluation is global, systemic and deeply entrenched in economic and social structures.¹⁶ Whether women work in a developing or developed country, are paid or not paid, employed or self employed, their work in the formal and informal economy is performed in segregated ghettos characterized most often by low pay, precariousness, inferior conditions and weak or no regulation.¹⁷ While women have more opportunities for work in the new globalized economy, their conditions of work have not commensurately improved with the level of their contributions to the economy. Although men are also being forced into more precarious jobs, as noted by a 2005 United Nations report, "the further down the chain of quality and security, the more women you find". At the same time, the Report states their unpaid and poorly paid work in insecure jobs or small enterprises "holds families and communities together" and is critical to the world's ability to meet the 2015 Millennium Development Goals for poverty reduction.¹⁸

Women's work differs from men's work worldwide both in terms of the types of work and the structure of employment relationships.¹⁹ Women can be found working in the formal and informal economy, in subsistence production, unpaid care and volunteer work. Gender-based pay discrimination is a complex, multi-faceted problem.²⁰

Women experience discrimination in almost every aspect of the labour exchange - this ranges from whether they have paid work at all, the type of work they obtain or are excluded from; the availability of supports such as child care; their pay, benefits and conditions of work; their access to higher paying "male" work; the insecurity of their jobs or enterprises; their lack of any or equitable pension entitlements; and not having the time, resources or information to enforce their rights. Women who are disadvantaged by multiple factors such as race, ethnicity, indigenous or disability status experience more acute forms of pay discrimination.²¹ The right to pay equity addresses one aspect of this discrimination: the fact women are paid less than men for their work because they are women. It does not address the fact that women receive less pay because of the discriminatory barriers they face in accessing higher paid male work. This discrimination is addressed by employment equity or affirmative action measures and is an important subject to be addressed as part of the ongoing research needed into improving women's incomes.

This systemic gender discrimination is widely acknowledged internationally in research literature, and in public policy. Dating back to the 1970's and 1980's, scholars such as sociologist Pat Armstrong and others have detailed the evidence substantiating the gender basis for the

¹⁶ Chicha, *supra* note 4.

¹⁷ Armstrong & Cornish, *supra* note 2 and ILO, GLOBAL EMPLOYMENT TRENDS: BRIEF, Geneva, January, 2006.

¹⁸ UNIFEM, *supra* note 1 and United Nations, *Taking Action: Achieving Gender Equality and Empowering Women*, UN Millennium Project, Task Force on Education and Gender Equality, 2005.

¹⁹ Pat Armstrong and Hugh Armstrong, THE DOUBLE GHETTO, Toronto: McLelland & Stewart, 1984 and Lynda Ames, *Fixing Women's Wages: The Effectiveness of Comparable Worth Policies (Canada)* Industrial and Labor Relations Review, 48 n.4 (July, 1995) 705-725.

²⁰ *Id.*; UNIFEM, *supra* note 1 and Cornish et al. *supra* note 3, and Cornish, *supra* note 9.

²¹ ILO, *supra* note 6, TIME FOR EQUALITY; UNIFEM, *supra* note 1 and Armstrong and Cornish, *supra* note 2.

discrimination faced by women in the pay they receive for their work.²² Armstrong has testified in many Canadian pay equity cases which have set international pay equity legal standards.²³ Her work establishes that discrimination in women's compensation arises out of three interconnected fundamental features associated with women's work: 1) Women are segregated from men into different work and often different places of work; 2) Female-domination of work and low pay are linked and the more women are concentrated in a field of work, the less it pays. Overall, labour force data consistently shows that work mainly done by women is consistently paid less than the work mainly done by men, with little regard to the value of the work to the employer or the consumer; and 3) lower pay reflects the systemic undervaluation of women's work relative to that of men's work.²⁴ In the words of Armstrong:

*Many of the demands, conditions and contributions of women's work are invisible and undervalued both because so many women do these jobs and because female-dominated skills, effort, responsibilities and working conditions are associated with unpaid domestic or volunteer work. Yet such skills are essential to carrying out the work and are acquired over time, through training, even though they are often undervalued relative to those of men. Moreover, many of these women's jobs are highly demanding, but in ways so long associated with women that they are thought to be part of being a woman.*²⁵

It is also clear from the literature that these three defining characteristics are generally present regardless of the particular nature of women's work, her industrial sector, her own capacities, her "employer" and the presence or absence of male comparators in her workplace. While some of the gap is explained by legitimately valued differences such as experience and education, for the most part it comes down to unlawful discrimination in the failure to recognize and value the skills, effort, responsibility and working conditions of women's work because women do it.²⁶ Occupational segregation is the main organizing structure for perpetuating women's secondary status and the patriarchal system. It reinforces the gendered division of work; pays low wages; creates women's inferior jobs and benefits; and maintains women's economic dependence and lack of effective bargaining power in the labour market.²⁷ As the pay discrimination women experience arises because they are associated with the work, this prejudice and undervaluation does not stop at the edge of the "employee" relationship but also infuses the work women do as entrepreneurs and own account workers.

B. Globalization, Labour Markets and Women's Pay

International trade and investment practices, labour migration, the transfer of work globally through transnational corporations (TNCs) and the global information economy are transforming labour

²² D. Treimann and H. I. Hartmann, *WOMEN, WORK AND WAGES: EQUAL PAY FOR WORK OF EQUAL VALUE* (Washington: National Academic Press, 1981).

²³ Armstrong, et al., *supra* note 6.

²⁴ ILO, *supra* note 6, *TIME FOR EQUALITY*.

²⁵ Pat Armstrong, *Equal Pay for Work of Equal Value*. Expert report prepared for the Canadian Human Rights Commission, Ottawa, 2002 and Pat Armstrong, Affidavit in the Court case, *CUPE et al v. Attorney-General (Ont.) et al.* 2001, see <http://www.web.net/~equalpay/pataffidavitapril15mcfinal.PDF>.

²⁶ *Id.*

²⁷ Armstrong and Cornish, *supra* note 2 and Cornish et al. *supra* note 3 and Fudge and Vosko, *supra* note 10.

markets and the effects are highly gendered.²⁸ Given that the “free market” operates to underpay women’s work, neo-liberal forces which champion that free market are increasingly undermining existing efforts to reduce the global gender pay gap.²⁹ Macroeconomic policies based on international, regional and bi-lateral trade and financial obligations can have a profound effect on the capacity of a country and its economy to deliver pay equity to those doing “women’s work.”³⁰ Instead of work becoming formalized and better protected as the new economies grow, the global trend is to informality and insecurity. Even formal work is increasingly precarious with many enterprises having a core labour force dominated by men with women workers increasingly found in the networked peripheral, temporary, contract and home-based work which supports such globalized enterprises.³¹ Increasingly some women have no “employer” at all as many are driven into self-employment or work as own account workers.³² Even where women have gained access to work through new trade practices in the export processing zones, economic forces often lead state actors to agree to weak labour laws or to condone weak enforcement which permits them to be subjected to inferior labour practices.³³

With productive decentralization and “flexibilization” leading to the “individualization” of labour conditions and the elimination of “collective intermediaries like labor unions”³⁴, the equality role of trade unions and collective bargaining protections has been undermined. Neo liberal economic policies and tax cuts have also reduced state resources and the capacity to regulate and implement policies to carry out the human rights role of ensuring the gender equality of citizens and migrants. These policies also drive governments to further depend on underpaid women’s work to deliver public services and on women’s unpaid care and community work when public services are privatized or eliminated.³⁵ As women are increasingly found in the informal, unregulated economy and outside of waged employment altogether, many marginalized women are excluded from the traditional pay equity remedial protections which focus on comparing male and female waged work within a formal enterprise. Labour law must now adjust to protect women’s work which is performed everywhere including offices, hospitals, farms, plantations, homes, and often in the streets.³⁶

²⁸ H. W. Arthurs, *Labour Law Without The State* (1995) 46 U.T.L.J. 1, Alain Supiot, *supra* note *The Transformation of Work and the Future of Labour Law in Europe: A Multidisciplinary Perspective*. INTERNATIONAL LABOUR LAW REVIEW, 138:1 33, 1999; Michel Piore and Sean Safford, *Changing Regimes of Workplace Governance, Shifting Axes of Social Mobilization and the Challenge to Industrial Relations Theory*, INDUSTRIAL RELATIONS: A JOURNAL OF ECONOMY AND SOCIETY, 45 (3), 299-325, 2006; Bob Hepple, *New Approaches to International Labor Regulation*, (1994) 26. INDUST.I.J. 353; Judy Fudge, *SUPRA* NOTE 29. Kerry Rittich, RECHARACTERIZING RESTRUCTURING: LAW, DISTRIBUTION AND GENDER IN MARKET REFORM, The Hague:Kluwer Law International, 2002; and *Cornish, supra* note 3.

²⁹ Armstrong & Cornish, *supra* note 2 and Supiot, *supra* note 28.

³⁰ Cornish, *supra* note 9.

³¹ Judy Fudge and Rosemary Owens, eds. *Precarious Work, Women and the New Economy: the Challenge to Legal Norms* in *PRECARIOUS WORK, WOMEN AND THE NEW ECONOMY: THE CHALLENGE TO LEGAL NORMS*, Hart Publishing, 2006, Fudge and Vosko, *supra* note 10.

³² Fudge, *supra* note 28 and Armstrong and Cornish, *supra* note 2.

³³ Cornish et al. *supra* note 3.

³⁴ Jelle Visser, *supra* note 34. and ILO, ORGANIZING FOR SOCIAL JUSTICE, p. 113 at <http://www.ilo.org/declaration>.

³⁵ Armstrong & Cornish, *supra* note 2.

³⁶ ILO, *supra* note 36.

III. PAY EQUITY - THE HUMAN RIGHTS IMPERATIVE AND FRAMEWORK

The imperatives for securing pay equity for women's work start with the fundamental human right to be free from gender discrimination in the payment of work. Apart from this overarching right and obligation, there are also compelling arguments supporting pay equity as both a short and long term economic and development requirement.

A. Pay Equity - The Development of a Fundamental Human Right

The international equality seeking community, including the ILO, United Nations, trade unions and NGOs have spent the last 100 years developing standards which represent the international and regional consensus on the pay equity obligations of state actors, institutions and social partners. International instruments have imposed increasingly specific directives for action to be taken by signatory states in order to achieve pay equity for women. The ILO's 1952 Convention 100 was the first ILO standard which incorporated a systemic approach to redressing a labour market problem. This was followed by the 1958 ILO Convention 111 prohibiting discrimination in employment and more broadly in "occupation" which covers self-employment. These two Conventions shaped the development of future gender equality labour-related instruments. They also form part of the core labour standards enshrined in the ILO's 1996 *Declaration on Fundamental Principles and Rights at Work* which recognizes that achieving pay equity for women is interconnected with the securing of the other fundamental labour rights of freedom of association and the right to collective bargaining.³⁷

Subsequently with the 1966 International Covenant on Economic, Society and Cultural Rights and the International Covenant on Civil and Political Rights, the right to pay equity was also enshrined in general human rights instruments, and, language requiring the guarantee of rights started to be incorporated. It was recognized that pay equity is interconnected with and necessary to sustain all other economic, social, civil and political rights. With the gender-focused instruments, the 1979 UN Convention on the Elimination of All Forms of Discrimination Against Women and the 1995 Beijing Platform and Declaration of Action, and the the Beijing +10 UN documents, international pay equity directives used even stronger proactive language *requiring* government and employers to ensure equality outcomes for women in practice and mandating regular reporting to monitor compliance.³⁸ This was in recognition that the undervaluation of women's work is fundamental to women's low socio-economic status and therefore pay equity strategies are an essential way to establish the overall conditions for women's equality.³⁹ In addition to international standards, pay equity has been included in some regional mechanisms, the most prominent of which is Europe's Equal Pay Directive and the inclusion in NAFTA's NAALC of two labour principles, one on equal pay and the other on the elimination of employment discrimination.⁴⁰ At the same time as

³⁷ Pay Equity: A New Approach to a Fundamental Right, *supra* note 6. and Cornish and Armstrong, *supra* note 2.

³⁸ See Cornish et al. *supra* note 6 and Cornish et al. *supra* note 3; and *supra* note 18, *Taking Action: Achieving Gender Equality and Empowering Women*.

³⁹ Cornish et al, *supra* note 3; Armstrong et al, *supra* note 6.

⁴⁰ See Dir 75/117/EEC on equal treatment between men and women on the application of the principle of equal pay. Now 3 of Article 141 EEC. Also see Dir 76/207/EEC on equal treatment of men and women for access to employment vocational training, promotion and working conditions. Dir 79/7/EEC concerning the prohibition of discrimination in statutory social security schemes; Mary Cornish, *Employment and Pay Equity in Canada - Success Brings Both Attacks and New Initiatives*, CANADA-UNITED STATES LAW JOURNAL, v. 22, 1996. and Cornish et al.,

governments were committing internationally to more specific and pro-active equality standards, they were also world-wide moves to deregulate labour markets which were often combined with moves to dismantle or weaken state institutions which would carry out those obligations.⁴¹

B. What are the International Pay Equity Standards?

Drawing from all these instruments, the following standards must be observed: 1) The principle of equal pay for work of equal value or pay equity must be guaranteed, requiring that women's work where comparable to men's work must receive equal pay; 2) Equal pay for work of equal value is a fundamental labour standard of the highest priority, necessary for building a sustainable, just and developed society; 3) Governments should enact pay equity mechanisms covering both the public and private sector to ensure that the full and practical realization of the right is guaranteed and achieved "without delay", with the necessary mobilization of adequate resources to achieve that goal; 4) Pay equity must break the cycle of systemic discrimination by providing a framework to challenge systemic assumptions and practices that lead to the undervaluing and under-compensating of women's work; 5) Employers have a proactive obligation to achieve pay equity in their workplaces; 6) Pay equity mechanisms should require specific gender inclusive or gender neutral methodologies for evaluating and comparing the different work men and women do and for reformulating the pay structures of women's jobs; 7) Unions and representatives of non-unionized employees must be afforded an active role in developing and enforcing pay equity; and 8) Complaints regarding lack of pay equity must be enforceable before a competent and expert tribunal with meaningful sanctions for non-compliance.⁴²

C. Impact of International Standards on Labour Market Governance of Pay Equity

It is clear from these standards that governments are *required* to establish labour market governance mechanisms to implement the right to pay equity. Therefore the voluntary measures which have been called for by some scholars are not consistent with such human rights obligations.⁴³ The only discretion left to governments, enterprises, trade unions or other institutions is choosing the best way to identify and dismantle the long-standing patterns of systemic

supra note 9.

⁴¹ Armstrong and Cornish, *supra* note 2 and Cornish et al. *supra* note 3.

⁴² ILO EQUAL REMUNERATION CONVENTION (NO. 100) (ILO Convention No. 100), Articles 1, 2(2), 3, 4; ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK (ILO Declaration) at http://www.unhchr.ch/html/menu3/b/d_ilo100.htm; INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ICESCR), Articles 2, 3, 7, 16, 17 at http://www.unhchr.ch/html/menu3/b/a_cescr.htm; Convention on the Elimination of Discrimination Against Women (CEDAW), Preamble, Articles 2 (b), (c), (d), (e), (f) 11, 24, Part V at <http://www.unhchr.ch/html/menu3/b/e1cedaw.htm>; Fourth World Conference on Women Action for Equality, Development and Peace *Beijing Platform for Action (Beijing Platform)*, Paras. 4, 5, 41, 45, 165 (a), 166 (l), 175 (k), 178 (a), (c), (h), (l), (k), (o) at <http://www.un.org/womenwatch/daw/beijing/platform/declar.htm>; Fourth World Conference on Women Action for Equality, Development and Peace *Beijing Declaration (Beijing Declaration)*, Paras. 7, 20 at: <http://www.un.org/womenwatch/daw/beijing/platform/declar.htm>; United Nations, A/RES/S-23/3 Further actions and initiatives to implement the Beijing Declaration and Platform for Action-Outcome Document . (*Beijing +5 Resolution*), Paras 82(h) at: <http://www.un.org/womenwatch/daw/followup/ress233e.pdf>; United Nations, *International Covenant on Civil and Political Rights (ICCPR)*, Article 3 at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm.

⁴³ Paul C. Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth*. 99 HARVARD LAW REVIEW 1728 1985-1986 Paul C. Weiler, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW, Harvard University Press, 1990 and Nitya Iyer, *supra* note 5.

compensation discrimination. Effective and sustainable pay equity mechanisms which increase the pay received by undervalued “women’s work” in relation to “men’s work” are not optional. With the “human rights” element as the defining perspective of any implementation mechanism, any increases to the pay for “women’s work” is then a “human rights remedy” providing redress for the fact that gender-based stereotypes have previously artificially reduced the pay women should have received for that work. It is not merely a “pay increase” which can be cutback or eliminated when it suits the cost-cutting agenda of a government or enterprise.⁴⁴

It is for this reason as well that a discourse which concentrates on the issue as one of “low pay”, while helpful for building alliances and addressing poverty, is not sufficient since it fails to expose the discrimination women are subjected to and does not harness the “right” women have to pay redress. Further, without an overriding legal right to pay equity being enshrined in national laws, it is subsequently very difficult for women to legally challenge the failure to be paid equitable wages as well as cutbacks to those wages which may occur. The more successful women are in gaining access to pay equity, the stronger the backlash from both governments and enterprises and the greater the need for vulnerable women to have a strong state with effective laws to protect them.⁴⁵ The human rights focus also highlights the empowering component of pay equity where the process of making visible and acknowledging the importance of women’s work is valuable in and of itself as a means of transforming the discourse and enabling women and men to reach a new respect for the worth of what women do.⁴⁶ ILO Conventions 100 and 111 read together can be interpreted to require the elimination of pay discrimination from a broad range of women’s work, including those in the informal economy and in self-employment. When combined with the international pay equity standards referred to earlier, it is clear that the difficulty lies not in the breadth of the international rules but in fashioning the pay equity mechanisms which will deliver the promise of those standards.

IV. PAY EQUITY - THE BUSINESS AND DEVELOPMENT IMPERATIVE

While the human rights imperative for securing pay equity should be enough, experience has shown a business and development case must also be made and this is not hard to do. Poverty reduction, sustainable economic growth and pay equity are all inextricably interlinked. The World Bank in its 2006 World Development Report highlights the ongoing global gender pay gap as part of the profound and increasing economic inequalities which are impoverishing not only women but children, families and communities. Finding that markets in developing and developed countries are often exacerbating rather than correcting the problem, the Bank calls for pro-active, concrete equity planning to remedy the “inequality traps” which will otherwise “tend to reproduce themselves over time and across generations”.⁴⁷ Similarly, the World Bank’s 2006 Gender Action Plan also calls on countries to harness the economic growth potential of the planet’s women by rectifying the

⁴⁴ Cornish and Armstrong, *supra* note 2; Cornish et al. *supra* note 9, *Litigating Pay and Employment Equity*; Patricia Hughes, *SEIU, Chambers and Valian v. Ontario: A Model for Future Challenges to Government Action?* 6 CAN. LAB. EMP. LAW. JOURNAL. 78; and Patricia Hughes, *Newfoundland (Treasury Board) v. N.A.P.E: Women as Sacrificial Lambs*. 11 CAN.LAB.EMP. LAB. LAW .J. 384.

⁴⁵ Cornish and Armstrong, *supra* note 2 and Cornish, *supra* note 9, *Engendering Citizenship*.

⁴⁶ *Id.* and Margaret Hallock, *supra* 5.,

⁴⁷ *Id.* and World Bank, GLOBAL MONITORING REPORT, MILLENNIUM DEVELOPMENT GOALS: STRENGTHENING MUTUAL ACCOUNTABILITY, AID, TRADE AND GOVERNANCE, World Bank, 2006.

systemic labour market inequalities women face.⁴⁸ Given that a poor woman's main asset is her labour and that asset is subject to a world wide penalty because of the gender of the asset holder, poverty reduction efforts will not make any significant headway until the global gender pay gap is addressed.⁴⁹ Social protection strategies increasingly focus on incorporating implementation of the ILO's core labour standards which includes Conventions 100 and 111.⁵⁰ With businesses needing an efficient labour market, discriminatory barriers to the full productive use of half the world's labour supply is a massive inefficiency which needs to be rectified.⁵¹

Despite the global consensus on paper that the global pay gap must be narrowed, when it comes to implementation, women are repeatedly faced with the argument that redressing their inequality is too costly and therefore does not make good business sense or governmental policy. With enterprises and governments relying on the involuntary contributions of women's unpaid or underpaid labour to sustain their operations and economies, the equality debt owed to women continues to increase with no planning for how it is to be paid back or redressed. For every year of inaction the cost of redress is higher, the damage inflicted by the discrimination is deeper and the systemic benefits of equality fail to materialize.

VI. MAINSTREAMING PAY EQUITY INTO LABOUR MARKET GOVERNANCE

A. *New Models of Governance for Globalized Work*

Much has been said in scholarly and policy debates about the need to develop new governance models to address the fundamental transformation of who "labours", for whom labour is performed and the "conditions" under which such labour takes place in globalized workplaces. This includes understanding what labour law can and cannot do and also expanding what we understand by "labour" and the "law".⁵² With the proliferation of precarious employment statuses, declining trade union coverage, "individualized" and increasingly "informal" work relationships and a reduced role for the state, labour law's traditional governance models are not working for women and in many ways, never have.⁵³ Accommodations made in the Fordist industrial relations model for trade unions and collective bargaining concentrated on protecting the male-dominated model of "standard" employment, i.e. full time permanent employment.⁵⁴ While labour laws developed in the

⁴⁸ World Bank, WORLD DEVELOPMENT REPORT 2006: EQUITY AND DEVELOPMENT Washington, 2006 at 2 and World Bank, GENDER EQUALITY IS SMART ECONOMICS: THE WORLD BANK GENDER ACTION PLAN, Washington, 2006 at <http://siteresources.worldbank.org/INTGENDER/Resources/GAPNov2.pdf>.

⁴⁹ *Supra* note 6, TIME FOR EQUALITY and ILO, *supra* note 12, and Cornish, *supra* note 9, Engendering Citizenship.

⁵⁰ See Gordon Betcherman, Amy Luinstra, and Makoto Ogawa, Labor Market Regulation: International Experience in Promoting Employment and Social Protection. Washington, D.C.: The World Bank, 2002 and ILO, *supra* note 6, TIME FOR EQUALITY.

⁵¹ World Bank. INTEGRATING GENDER IN THE WORLD BANK'S WORK - A STRATEGY FOR ACTION, Washington, 2002.

⁵² Harry W. Arthurs, *Reinventing Labor Law for the Global Economy: The Benjamin Aaron Lecture* (2001) 22 BERKELEY J. EMP. & LAB. L 271; Paul C. Weiler, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW, Harvard University Press, 1990; Judy Fudge, Eric Tucker, & Leah Vosko, *Changing Boundaries of Employment: Developing a New Platform for Labour Law* (2003) 10 CAN. LAB. & EMP. LAW JOURNAL., 329, Supiot, *supra* note 28 and Piore, *supra* note 28.

⁵³ See Visser, *supra* note 34 at 482 for a discussion of this in the European context.

⁵⁴ Judy Fudge, *supra* note 28. and Armstrong and Cornish *supra* note 2.

mid-late twentieth century started to recognize the need to extend protections to the precarious and discriminatory conditions of women's work, neo-liberal global forces at the same time championed the value of individualism and the free market, reduced state intervention, weakened collective bargaining rights and shifted work to lower paid workers.⁵⁵ Under the neo-liberal model, employment rights are often tied either formally or in practice to the male-dominated more secure job.⁵⁶ Standing in contrast to the neo-liberal governance model, the social citizenship model ties employment rights to broader notions of work and society where empowerment, voice and equity are enshrined.⁵⁷

B. Making Women's Work Visible

1. Recovering Women's Work

So how do these new understandings of labour law governance apply to the securing of equitable pay for women's work?⁵⁸ There is an increasing recognition that effective governance requires up to date and accurate data concerning the nature and conditions of the workers who require protection. Only then can systems and structures be developed to influence the many different actors and institutions which impact on the conditions of women's work including state actors, enterprises, trade unions, women's organizations, NGOs, and domestic, regional and international institutions.⁵⁹ With women's work often forgotten, invisible, or discounted during the process of developing labour market laws and norms, it is essential to institutionalize methods which will shine a light on the continuum of women's work.⁶⁰

Saskia Sassen has highlighted the importance of recovering the role and value of women's work in economic processes at the local, national and global level through "mapping" such work. Once mapped, the necessary remedial action can be taken to ensure equitable treatment of the "recovered" work. Sassen's scholarship provides a useful example of the kind of analysis which is needed in order to understand where and under what conditions women work and the growing importance of women's work to the global economy and the absence of commensurate recognition and pay.⁶¹ Sassen outlines the stages of feminist literature which have documented this "recovery" starting with the role of women's "subsistence" work in financing the modernization of economies; the "feminization of the proletariat" with the internationalization of manufacturing production; the new global circuit of migrant workers; and the new urban "female proletariat" of women workers supporting the servicing, financing and management of global economic process supported by the new "serving classes" of women and immigrants performing housework tasks. For all these women, the systems for determining the pay for women's work which varies considerably must be exposed and steps taken to provide a way to deliver equitable pay to that work.

⁵⁵ Armstrong and Cornish, *supra* note 2.

⁵⁶ Michel Piore, *supra* note 28..

⁵⁷ Supiot, *supra* note 28, and Piore and Safford, *supra* note 28.

⁵⁸ See discussion in Rubery et al. *supra* note 5.

⁵⁹ Cornish et al. *supra* note 3.

⁶⁰ Leah Vosko *Precarious Employment: Towards an Improved Understanding of Labour Market Insecurity*, PRECARIOUS EMPLOYMENT: UNDERSTANDING LABOUR MARKET INSECURITY IN CANADA, Montreal and Kingston, McGill-Queen's University Press, 2005.

⁶¹ Saskia Sassen, Women's Burden: Countergeographies of Globalization: the Feminization of Survival. J. INT. AFF. 53:2 2000 503/

2. Engendering Labour Governance Concepts

With the new “feminized” proletariat, securing of equitable protections for women’s work must now be a defining centrepiece of any new “engendered” labour market governance. Traditional governance concepts must be reconsidered and reconstructed in light of the nature and conditions of women’s work. The policy goal is to develop mechanisms which will start to deliver gender equitable pay from the “contract of employment” and from the increasing entrepreneurial activities of self-employed women and own account workers.⁶² In both circumstances, women currently are required to submit to a labour market regime which systematically undervalues and underpays them for their “labour” because women do it or for their “products” or “services” because women supply them.⁶³

The first step is to enshrine in the new governance model a recognition that the work “standard” for women includes many different types of worker and self employment relationships and therefore the equality promoting mechanisms must vary accordingly to be effective.⁶⁴ As noted by feminist labour law theorists, the new paradigm of labour law is now comprised of many different equality mechanisms involving both state and non-state actors and moving beyond the traditional parameters of labour law as contracts, collective bargaining and statutory regulation.⁶⁵ Regulating mechanisms now involve a range of normative and binding rules including trading rules. As a result, there is a need to reconsider the interconnecting roles of the state and social partners and the appropriate balance of “hard” and “soft” law including the appropriateness of “decentred” regulation, such as corporate codes of conduct. This has led to a recent phenomenon where non-state actors other than employers and trade unions, namely NGOs, women’s organizations and consumers have started to develop equality roles within the labour governance system.⁶⁶

Instead of re-regulating work relationships to favour business, Armstrong and other scholars have called for mechanisms to protect women’s “standard” employment which must have at their core equal access and opportunities for men and women and lifelong learning to improve employability and flexibility in an ever changing global economy.⁶⁷ As the right to pay equity and freedom from discrimination in self-employment constitute two of the core labour standards found in the ILO Fundamental Declaration of Rights and Principles and a prerequisite for “decent work”, pay equity considerations must be addressed in looking at all aspects of labour market governance.

⁶² Otto Kahn-Freund, *Labour & the Law* 7 (Hamlyn Lectures, 24th Series, 1972).

⁶³ Armstrong and Armstrong, *supra* 19 and Fudge and Vosko, *supra* note 10.

⁶⁴ ILO, THE EMPLOYMENT RELATIONSHIP, Report V(1), International Labour Conference, 95th Session 2006, International Labour Office, Geneva.

⁶⁵ See Adelle Blackett, *Global Governance, Legal Pluralism and the Decentred State: A Labor Law Critique of Codes of Corporate Conduct*, (2001) 8 *Ind.J. Global Leg. Stud.* 401; Adelle Blackett & Colleen Sheppard, *Collective Bargaining and Equality: Making the Connections* (2003) 142 *International Labour Review*, 419; Colleen Sheppard, *Rethinking the Boundaries of Workplace Discrimination in Canada*, presentation to Workplace Discrimination Seminar, Washington, D. C. November 18-19, 2004; Judy Fudge, *supra* note 28. and Kerry Rittich, *supra* note 28.

⁶⁶ Armstrong and Cornish, *supra* note 2; Adelle Blackett, *id.*; United Nations, “Challenges and Recommendations and the Role of Women’s NGO’s” prepared by Genoveva Tisheva, October 30, 2005 for the UNDAW Expert Group Meeting, “Enhancing Participation of Women in Development Through An Enabling Environment for Achieving Gender Equality and The Advancement of Women Bangkok Thailand, November 8-11, 2005.

⁶⁷ Fudge, *supra* note 28 and Armstrong and Cornish, *supra* note 2.

The first concept to reconsider is that of the “workplace”. With its connotation of a single location and single employer, “workplace” fails to capture the array of conditions of women’s work such as the export processing zone factory, street vendor operations, crafts cooperatives, the sex trade or migrant domestic workers.⁶⁸ The concept of women workers as “employees” must also be re-examined. Now women’s precarious employment is increasingly leading them to self-employment, some in global production chains and others in craft or small business enterprises.⁶⁹ Engendering the meaning of “employer” requires examination of the many ways that business enterprises seek to avoid responsibility for the “employment” and affording of labour rights to women through outsourcing, networked enterprises and disguised employment.

VI. LESSONS LEARNED FROM PAY EQUITY GOVERNANCE TO DATE

Efforts during the 20th century to address the global gender pay gap focussed initially on redressing the failure to pay women the same pay as men when they did the same job. Many countries developed laws which prohibited this practice. Such laws only addressed a very small portion of the problem since the occupational segregation of labour markets world-wide means that most women do not work in the same jobs as men. The right to equal pay for work of equal value or pay equity set out in ILO Convention 100 has a much broader meaning. It provides that the work women do should be paid the same as the work men do if it is comparable on the basis of skill, effort, responsibility working conditions. As stated by recent ILO report on Convention 100 implementation, the achievement of equal pay for work of equal value for the world’s women remains “largely unattained”.⁷⁰ The 2003 ILO Time for Equality Report documented the world-wide continuing pay discrimination and the need to address the matter on an urgent basis. The European Commission’s 2006 Report criticized strongly the continuing wide pay gap.⁷¹ International institutions such as the World Economic Forum, the World Bank and others have all highlighted the continuing serious consequences for the failure to close the global gender pay gap.

Why is there so little compliance? Firstly, while most countries have ratified ILO Convention 100, only a much smaller number have actually passed implementing laws. In North America, Ontario and Quebec and Canada’s federal jurisdiction are three of a small number of jurisdictions who have passed such laws, with Ontario and Quebec having pro-active laws covering the public and private sectors. Where pro-active pay equity laws have been passed, some women, particularly those in the public sector having union representation have obtained very significant pay equity adjustments. In Ontario, 100,000 of the lowest paid public sector women working in predominantly female workplaces such as child care centres and nursing homes have received hundreds of millions of dollars in pay equity adjustments payable on an ongoing annual basis as a result of two separate court cases to enforce their rights under Ontario’s *Pay Equity Act*.⁷² In Quebec, a 2006 pay equity settlement with the Quebec Government ten years after its *Pay Equity Act* was passed entitles some 327,000 women in the public sector to substantial pay equity adjustments and \$1.5 billion in back pay with the total settlement valued at an estimated \$4 billion. Both cases were

⁶⁸ UNIFEM, *supra* note 1.

⁶⁹ Sassen, *supra* note 61.

⁷⁰ Chicha, *supra* note 4.

⁷¹ Commission of the European Communities, Report from the Commission to the Council, the European Parliament, the European Economic and social committee and the committee of the regions on equality between men and women. Brussels. COM. (2006) 71 final. (February 22, 2006).

⁷² Cornish and Faraday, *supra* note 9, Litigating Pay and Employment Equity.

brought by public sector unions but the results also covered non-unionized women working in other public sector workplaces. Even under the Federal complaint-based equal value law, women workers have received major settlements, although again after costly and lengthy legal battles. Bell Canada's 4,765 telephone operators received a \$104 million pay equity settlement in 2006 which included pay equity settlement monies, payment for pain and suffering and adjustment to pensionable earnings.⁷³ The Canadian Federal Government also paid out approximately \$3 billion in pay equity adjustment to women in predominantly female jobs in the Government. As well, there are many pay equity initiatives worldwide, particularly in the public sector, where women are challenging their employers to provide an equitable wage structure through pay equity comparisons.⁷⁴ The process of achieving a new valuation for women's work has been an empowering one for women who are able to participate in a process where the value of their work is being recognized.

At the same time as there have been many successes in Quebec and Ontario based on the mandatory pay equity laws, there has also been substantial non-compliance. In a recent speech, Ontario's Chief Pay Equity Commissioner stated that there was major non-compliance in the private sector after nearly 20 years of Ontario's law being in place.⁷⁵ This non-compliance is particularly acute in non-unionized sectors.

The main limitations of pay equity legislation, identified by many commentators include: Pay equity laws are too limited in scope and cannot easily adapt to changing labour markets; some schemes are solely complaint driven; definitions of female job descriptions may be too narrow; technical requirements to assess job comparisons may be too onerous; comparison tools may incorporate implicit gender bias and hierarchical issues; employers have the power to change job descriptions; there is typically a lengthy time for implementation of private sector wage adjustments; compliance is to say the least, erratic in smaller workplaces; employer sanctions are not sufficiently severe; the privatization of public services has eroded pay equity gains; there is lack of enforcement especially in non-unionized or less unionized sectors.⁷⁶

The ILO has recently studied key models used in six jurisdictions: Sweden, Quebec (Canada), United Kingdom, Netherlands, France and Switzerland. The report shows that there are a number of different design models for pay equity. The first model studied was Sweden and Quebec, Canada which is based upon legislation that identifies wage discrimination through a comparison between a female-dominated and male-dominated jobs for the same employer or the same establishment, an evaluation of these jobs using a non-discriminatory method of analytical job evaluation and an estimate of the pay gap between these jobs. This model, which was also used

⁷³ Communications Energy and Paperworkers Union of Canada, Information Release, 2006. "CEP reaches \$104 Million pay equity settlement at Bell". See www.cep.ca.

⁷⁴ See Public Service Alliance of Canada website for information at <http://www.psac.com/what/payequity/pay-e.cfm#http://www.psac.com/what/payequity/pay-e.cfm#>; See Pay Equity Case studies prepared by Public Services International which details pay equity initiatives in many countries as well as the PSI bi-monthly newsletter, Pay Equity Now at http://www.world-psi.org/TemplateEn.cfm?Section=Pay_Equity_Campaign&CONTENTID=8999&TEMPLATE=/ContentManagement/ContentDisplay.cfm

⁷⁵ Speech of Emmanuela Heyninck, Ontario Pay Equity Commissioner, Ontario Federation of Labour "Pay Equity Maintenance: Union Obligations and Liabilities, November 14, 2006, Toronto.

⁷⁶ Armstrong and Cornish, *supra* note 2; Fudge and McDermott, *supra* note 5.;Hallock, *supra* note 5.; and Iyer, *supra* note5.

in Ontario, Canada, requires companies to adopt an action plan to rectify discriminatory pay gaps through pay increases within established time frames. This model seeks to remove the underpinnings of discriminatory aspects of pay with the final objective to institute equal pay. The second model, described as the equal opportunities model in the United Kingdom and Netherlands focuses more on equal opportunities rather than results. While it provides a rich guidance for job evaluation, it does not require a structured sequence for achieving pay equity, nor that pay equity be achieved in a specific time frame. As a complaint-based model, it tends to rely more on an employer's "voluntarism". There is a low level of employer compliance. The third model, used in France and Switzerland, is based upon gender pay gap indicators relying upon the productivity characteristics of female workers with limited measures that target the discriminatory pay gap. Again, compliance with this model is very low. Compliance in fact declines as you move from model one to two and three.⁷⁷

Not surprisingly, the report concludes that model one is the most effective because of the following features: the time-specific detailed requirements for the steps to achieve pay equity results; the requirement for a job evaluation methodology that focuses on "how to estimate the pay gap between jobs of equal value and how to calculate the pay adjustments to be made; the requirement to enact "compulsory, proactive legislation" and the provision of technical support by specialized bodies dedicated to pay equity.

There are number of key challenges facing the struggle to close the global gender pay gap: 1) declining unionization rates and protection of the right of workers to organize collectively; 2) flexibilization of employment relationships with the rise of precarious work arrangements and self-employment, which although not new to women, have expanded; 3) expansion of the informal economy; 4) work reorganization – proliferation of new forms of horizontal corporate organization internationally (contracting out and subcontracting), privatization in public sector and; 5) lack of state intervention: legislative weaknesses and limitations, lack of enforcement and the reliance on 'soft law corporate codes of conduct which frequently lack effective monitoring and enforcement mechanisms.

Implementation efforts have not focused on the full range of women's work. Systemic and coordinated pay equity mechanisms and enabling strategies must be developed to require employers, governments and markets to pay equitably for the work women do now. This is distinct from although related to employment equity measures which are also of critical importance and are directed at women gaining access to higher paying "male" work and incomes.

While international instruments clearly require signatory countries to establish effective laws and institutions to allow women to redress labour market violations, most countries do not have effective laws. The laws that are in place are often inaccessible to women who lack the resources to access the legal system. Most enforcement systems are complaints-based and thus rely on individual workers, their representatives or administrative officials to trigger their operation. Given the systemic nature of labour market gender discrimination and the limited available resources, a complaint-based approach is generally ineffective and too slow to achieve significant equality results. A recent Canadian Task Force report called for a pro-active law in the Federal sector although this proposal has now been rejected by a newly elected national government.⁷⁸ It is for

⁷⁷ Chicha, *supra* note 4.

⁷⁸ See Pay Equity: A New Approach to a Fundamental Right, *supra* note 6.

this reason that international instruments require states, employers and unions to take a proactive approach to redressing gender equality by identifying the systemic problems and developing systemic solutions. Given the strong "political" dynamics of the labour market and the necessity to ensure the rule of law, mechanisms must be developed to enforce these solutions.⁷⁹

VII. CLOSING THE GAP DESIGNING PAY EQUITY PROMOTING MECHANISMS

A. *The Role of the State in Securing Pay Equity*

The nation state must continue to play a major equality role in the implementation of international pay equity standards. This will be done through designing effective and resourced laws, policies, institutions and supportive measures which will translate those standards into justice mechanisms which women and their representatives can access and enforce. With the widespread violation of women's pay equity rights, women need more rather than less state intervention.⁸⁰ Depending on the nature of the work, the state will need to tailor its approach to include the right combination of mechanisms and then to monitor whether such approach is in fact closing the pay equity gap in a sustainable way.

B. *Planning for Pay Equity*

1. International, Regional, National, Sectoral and Enterprise Plans

Systemic gender discrimination requires gender-sensitive systemic planning and remedies.⁸¹ Pay equity plans must be developed at all levels of the labour market, starting with trading agreements and going right down to the enterprise and entrepreneurial level. In this way, the necessary multi-layered strategies are all grounded in the realities of the specific discriminatory pay patterns at work. In order to promote coordination and avoid duplication, pay equity measures, plans and targets should be embedded in the existing equality promoting reporting and planning mechanisms which are required at the international, regional, national, local and enterprise levels. This includes the Poverty Reduction Strategy Papers, the CEDAW country reports, the Beijing Declaration "Gender Equality Plans" and the ILO reporting mechanisms on Conventions 100 and 111. This will promote the mainstreaming of pro-active pay equity measures into the decision-making of all those who impact on the payment of women's work and not just the traditional "employer" which has been the focus of most pay equity strategies. This would include for example those who negotiate trade treaties, prepare state budgets and provide development assistance for micro-enterprises. The inclusion of pay equity promoting measures in these plans, agreements and functions will also help to articulate the need for pay equity laws, policies and practices to function as one part of a country's gender equality promoting system.⁸² This planning approach will also facilitate the monitoring of the reduction of the pay gap.

⁷⁹ *Id.*

⁸⁰ Armstrong and Cornish, *supra* note 2 and Aileen McColgan *Government and Pay and Employment Equity: The Role of the State in Achieving Equity in the Workplace*. paper for the Pay and Employment Equity for Women Conference, Wellington, New Zealand, 28 June 2004.

⁸¹ Armstrong and Cornish, *supra* note 2.

⁸² Cornish and Faraday, *supra* note 6, *Achieving Pay and Employment Equity*.

2. Mapping the Problem

Pay equity mechanisms need to be grounded in a concrete, data-based analysis of the nature and conditions of women's work and the specific economic, political and social constraints and prejudices which women face in obtaining equitable pay for their work. This fact-based analytical process carried out in consultation with women's voice organizations would allow the state and other equity actors to properly design the necessary justice mechanisms. This mapping should include: assessing the extent of gender-based prejudice and stereotypes; the state of the economic conditions and impact of globalization; the degree of sovereignty of the state and its ability and capacity to regulate and allocate resources; the state of social reproduction and social relations including the burdens women face of reconciling work and family life; the existence or non-existence of mechanisms or institutions to promote equality; the capacity and extent of civil society development. This analysis should make visible the various types of work which women do and the pay conditions under which such work is performed. This could then lead to the design of specific labour market levers which will deliver greater pay to women for the work they do. This approach will require resourcing and capacity building to produce the necessary, sex-dis-aggregated data and to train those participating in the analysis of pay equity considerations.⁸³

C. Understanding and Addressing Gender Differences

As gender-based pay discrimination is the result of complex social interactions and prejudices within the workplace and society as a whole, pay equity strategies should be informed by and designed to reflect the gendered experiences of women. Given how deeply sexist stereotypes are entrenched, mechanisms must confront the social, cultural and patriarchal stereotypes and restraints which label women's work as secondary or marginal and therefore less valuable than men's work.⁸⁴ Starting to recognize and value women's work will help to lessen the victimization and powerlessness which women experience in other aspects of their lives. Ultimately, long term changes in the value of women's work will also require measures to address the discrimination women face in other areas of their lives including health, education, exposure to violence, conflict and poverty.⁸⁵

D. Mobilizing Women's Collective Voice and Trade Union Rights

Women and their organizations, working with unions and other NGOs, are mobilizing to secure their rights. Transforming global pay systems will require the active role of women as partners and agents in the reform process. Given women's current income and power deficits, they often do not have the time, resources or information to assert their rights. Achieving pay equity must therefore be linked to enabling women to exercise other fundamental labour and employment rights such as freedom of association, the right to collective bargaining and the right for their entrepreneurial voices to be heard in economic-decision making.⁸⁶ The World Bank has recently underlined this

⁸³ Cornish, *supra* note 9, Engendering Citizenship.

⁸⁴ See the recent ILO study THE QUALITY OF WOMEN'S EMPLOYMENT: A FOCUS ON THE SOUTH by Kanchana N. Ruwanpura which reflects on the considerations and measures that must be taken to address social and institutional labour market restraints in designing labour market gender equality protections. Decent Work Research Programme, International Institute for Labour Studies. Online: International Institute for Labour Studies, 2004 at <http://www.ilo.org/public/english/bureau/inst/research/crbien.htm>.

⁸⁵ Armstrong and Cornish. *supra* note 2 and Cornish et al, *supra* note 3.

⁸⁶ Cornish and Faraday, *supra* note. 9. Achieving Pay and Employment Equity.

role stating that “the collective organization of workers is one of the main channels for securing better and more equitable working conditions”.⁸⁷ Trade unions provide this collective voice and many work hard to promote equality measures. The global union, Public Services International (PSI) has been carrying out a world wide campaign entitled “Pay Equity Now” which operates in both developed and developing countries providing resources and training materials.⁸⁸ The Bank has noted the role of trade unions in reducing inequality and wage discrimination in countries as diverse as Ghana, the Republic of Korea, Mexico and Spain.⁸⁹

Yet most women worldwide do not have access to a union. As well, the informalization and individualization of the economy has undermined the role for unions. The invisibility of women’s work makes it difficult to organize as many women do not work in traditional workplaces accessible to trade unions. As a result, women NGOs, both at the local and national level, have mobilized the necessary knowledge and played a key advocacy role with local and national businesses and government and this role needs to be supported.⁹⁰ Some of the most effective organizing of women’s voices to increase women’s pay has come from organizations of women entrepreneurs.

Given the resistance to unionization, the state must establish a strong and supportive legal and policy environment that encourages and protects collective bargaining rights and ensures that those rights are accessible to women in the work they do. Laws must require unions to represent women workers without discrimination and to ensure that they are independent from government and business control. Consistent with the recommendation of the ILO Committee of Experts, labour and equality rights laws should be integrated so that unions and employers may work together to ensure women’s labour rights are protected⁹¹

E. Designing Pay Equity Laws

Drawing upon the work of Armstrong and other scholars and experiences to date, the following lessons have been learned which will help to guide the future development of pay equity mechanisms and strategies:⁹² 1) The state and others with equality responsibilities have a mandatory obligation to ensure that women can obtain this traditional human right. The only permissible discretion should be with respect to questions of timing and method of implementation. 2) Achieving and maintaining pay equity for the diversity of women’s work is a complex problem as the drivers forging women’s unequal pay are multi-faceted and inter-connected. Therefore, designing mechanisms to close the pay gap requires first a “diagnosis” of the national, local and enterprise or business context and circumstances; 3) Pay equity requires steps to be taken to make visible and to value women’s work and to confront the patriarchal constraints and prejudices

⁸⁷ World Bank, WORLD DEVELOPMENT REPORT 2006: EQUITY AND DEVELOPMENT Washington, 2006.

⁸⁸ See Public Services International website, www.world-psi.org/payequity for copies of the bi-monthly newsletter and the Pay Equity Resource Package.

⁸⁹ World Bank, WORLD DEVELOPMENT REPORT 2006: EQUITY AND DEVELOPMENT Washington, 2006.

⁹⁰ Cornish et al. *supra* note 3. Cornish and Faraday, *supra* note 9. *Achieving Pay and Employment Equity..*

⁹¹ Cornish et al, *supra* note *Achieving Pay and Employment Equity*, ILO *supra* note *TIME FOR EQUALITY*; Cornish, *supra* note *Mary, Engendering*

⁹² Armstrong and Cornish, *supra* note 2.

which has privileged male work and undervalued women's work; 4) Inequities are a systemic problem and require proactive, systemic planned solutions aimed at transforming the identified discriminatory circumstances that are causing the pay gap; 5) There is no single solution and a variety of different mechanisms are required to address the diversity of women's waged work in the formal and informal economy, women's self employment and the problem of work which is not paid at all. 5) Women's voice through their own organizations or trade unions must be at the center of the design of pay equity mechanisms as women themselves best understand the nature of discrimination against them and the most promising solutions. 6) Both state and non-state actors and social partners must be engaged in the pursuit of pay equity; Pay equity mechanisms must be participative and transparent; 7) Pay equity compliance requires constant renewal and transformation to address constantly changing nature and conditions of male and female work and changing structures and conditions of employers and the economy; 9) Enforcement mechanisms must be accessible and resourced.⁹³

F. Designing Pay Equity for Precarious Work

Given women's predominance in precarious employment in the formal and informal economy, the first step should be to use the mapping process to locate and understand the conditions of women's precarious employment. The next step should be to develop labour protections that will address the needs of these particular workers. Many of these women occupy the lowest paid and lowest skilled jobs in the informal sector. There are many women who have great difficulty in securing pay protections in the globalized context, with some even being forced to engage in forced or unpaid labour. Migrant women workers, including refugees, trafficked workers and smuggled immigrants must also be considered. Women in agriculture, vendors, workers in the export processing zones - all these workers need specialized attention.⁹⁴

An important tool in this area is the use of bargaining for sectoral and national wages. Centralized bargaining has traditionally tended to favour equality concerns. In the United Kingdom, in Australia, and in New Zealand, the decentralization of the industrial relations framework has had a negative impact on bargaining for gender equality, particularly for equality in remuneration⁹⁵. Sectoral or national wage bargaining is particularly helpful for those in precarious jobs, such as employment agency or household workers or to work together for access to credit where self-employed.⁹⁶

Minimum wage laws have been a tool of pay equity campaigns dating back to the 1970's when they formed a key part of Ontario's Equal Pay Coalition campaign.⁹⁷ More recently, Public Services International has made the living wage part of its pay equity campaign worldwide. For the poor who are predominantly women working in precarious employment relationships, pay equity is now seen more broadly as part of the overall struggle to promote economic and social rights.

⁹³ Armstrong and Cornish, *supra* note 2 and Pat Armstrong, Lessons from Canada, research paper commissioned by the New Zealand Government for presentation at the Pay and Employment Equity for Women International Conference convened by the New Zealand National Advisory Council on the Employment of Women, Wellington, New Zealand, June 28-30,2004, at <http://www.nacew.govt.nz/conference2004/papers.html>.

⁹⁴ Cornish. *supra* note 9, Engendering Citizenship, ILO, *supra* note 6 *TIME FOR EQUALITY AT WORK*::; *supra* note 12 ILO World Commission.

⁹⁵ ILO, *supra* note 6, *TIME FOR EQUALITY*.

⁹⁶ Cornish et al, *supra* note 3, Cornish and Faraday, *supra* note 9, *Achieving Pay and Employment Equity*, ILO *supra* note 6 *TIME FOR EQUALITY*;

⁹⁷ Armstrong and Cornish, *supra* note 2.

Lowly paid women are often working at the minimum wage and therefore increases to minimum wage statutes will provide a fast way to increase their wages without the need for women to complain and without the need to justify any increase based on a comparison with men's work. Higher minimum wages have been shown to reduce the dispersion of earnings and the incidence of low pay in developed countries⁹⁸. While studies have shown that minimum wage laws may be less effective in developing countries as a result of limited coverage and lack of enforcement, recent research has shown that minimum wages do have an impact in the informal rates.⁹⁹

Increases in minimum wages in developing countries have improved women's pay where the equalization of minimum rates occurred between men and women in sector-level collective agreements and where it established comparable wages across dissimilar and often sex-segregated workplaces - if the new minimum wage was set above the current female-dominated sectors.¹⁰⁰

G. Designing Pay Equity Mechanisms for Self Employed Women

For women who are self-employed as own account workers, contributing family workers or workers in cooperatives, pay equity mechanisms are needed which address the gender-based prejudices which infuse the pay they receive for their own labour, products or services. As just one example, this could include measures such as providing micro-financing assistance, marketing and export training and assistance, and other entrepreneurial supports which are comparable to those provided to micro-enterprises dominated by men.¹⁰¹ Successful strategies in this area would focus on closing the business income gap between men's and women's micro businesses. The World Bank Gender Action Plan includes support for affirmative action measures to assist female micro-enterprise entrepreneurs in gaining access to greater incomes. As well, efforts include measures to provide women entrepreneurs with limited forms of social protection to those of employees.

Collective organizations have played a key role in organizing women who are self-employed and the ILO has provided some assistance with funding, marketing and training initiatives. This may be seen in the organizing of the market traders in Cote D'Ivoire and Burkina Faso. ILO support was critical to establishing the institutional support and capacity building needed to give voice to the market traders.¹⁰² Co-operatives are another way of helping women to redress their unequal access to other economic resources, including land and capital which form the basis for access to credit.

⁹⁸ Armstrong and Cornish, *supra* note 2 and Betcherman et al. *supra* note 50.

⁹⁹ Lustig N. and D. McLeod, *Minimum Wages and Poverty in Developing Countries: Some Empirical Evidence*, in S. Edwards, ed., *LABOR MARKETS IN LATIN AMERICA: COMBINING SOCIAL PROTECTION WITH MARKET FLEXIBILITY*. Washington: Brookings Institution, 1997; Armstrong and Cornish, *supra* note 2; Cornish et al. *supra* note 3.

¹⁰⁰ Janine Rodgers and Jill Rubery *Perspective: the minimum wage as a tool to combat discrimination and promote equality* INTERNATIONAL LABOUR REVIEW 142:4 (2003) at 547.

¹⁰¹ Vosko et al, *supra* note 10.

¹⁰² Cornish and Faraday, *supra* note 3.

H. Corporate Social Responsibility

Corporate and institutional codes of conduct have become an important new tool in the struggle to secure protections for women's precarious work, particularly with respect to global production chains. Fueled by consumer campaigns, campaigns aimed at Gap, Nike and Tommy Hilfiger have persuaded companies that it is in their best business interest to improve the conditions of contractors' workers.¹⁰³ Concerns have been raised about CSR being private law and its effectiveness for pay equity purposes. Recent ILO analysis of the use of CSR as a pay equity strategy notes that most CSR mechanisms do not refer in any explicit way to the need to secure pay equity.¹⁰⁴ However, some do refer to the ILO core labour standards which include Conventions 100 and 111. The Calvert Women's Principles do explicitly include these principles and apply them to women's waged work and entrepreneurial activities.¹⁰⁵ Despite its limitation, CSR remains an important potential means to address this issue not as substitute for "hard" law but rather as a complementary strategy for implementing an employer's obligations.

IX. CONCLUSIONS - LOOKING TO THE FUTURE

Achieving and maintaining pay justice for women requires many different mechanisms. Policies implemented in a coordinated fashion are necessary to transform labour markets so that they can deliver equitable pay outcomes for women. The interrelationship between the various strategies and economic forces must be understood so that appropriate enabling structures can be created and nurtured. The country-specific dynamics which create gender-based income inequalities must be identified and understood so that pro-active pay equity measures are mainstreamed into the decision-making of all those who impact on the payment of women's work. Realistic objectives must be set and monitored with appropriate responsibilities assigned and resourced. Even as new pay equity mechanisms are created, the constantly changing nature of the economy and the forces of retrenchment will require constant reassessment and tailoring of those mechanisms to ensure that they will continue to be effective.

Tackling the issues addressed in this paper will require ongoing research and analysis to provide assistance to governments, women's representatives, decision makers, policy makers, NGOs, enterprises and trade unions to carry out their equality obligations. Further research will need to answer the following questions: What are the specific enabling legal, policy and institutional structures and systems needed to secure pay equity? What should be the features of new pay equity laws? What mechanisms are needed to mobilize and coordinate the efforts of international institutions, state actors and social partners including trade unions and socially responsible

¹⁰³ Cornish et al., *supra* note 3.

¹⁰⁴ Chicha, *supra* note 4.

¹⁰⁵ Calvert Women's Principles - see "establish pay equity policies that pay comparable wages and benefits, including retirement security benefits, to men and women for comparable work" and "encourage and support women's entrepreneurship, and seek to enter into contractual and other business relationships with women-owned businesses and vendors, including micro-enterprises, and work with them to arrange fair credit and lending terms". Available at <http://www.calvert.com/womensPrinciples.html>.

corporations to close the gender pay gap? What specific strategies will best help women and their representatives to be empowered to influence and take advantage of these pay equity mechanisms? In addressing the issue of securing access to equitable pay for women, the worlds of law, policy, human rights and economics meet. What initiatives can be taken to bridge the knowledge gap between lawyers, economists, gender experts, and development specialists, and legislators? Given the similarity of world patterns of pay inequalities and the globalization of national economies, both developed and developing countries will continue to have much to learn from each other about the design and implementation of effective pay equity mechanisms.

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