# Background Paper for the Working Group on Discrimination against Women in Law and Practice (the Working Group): Economic and Social Life

# The Right to Equal Pay for work of Equal Value

# Sandra Fredman

# Oxford University[[1]](#footnote-1)

# Executive summary

This Paper investigates equal pay provisions in seven countries, in different regions and with differing income levels, namely, the UK (which incorporates the law of the European Union); Canada (focussing on the province of Ontario); India; Brazil; Kenya; South Korea; and South Africa. It draws directly on work for the ILO on the implementation of ILO Convention 100 on equal pay for work of equal value for men and women[[2]](#footnote-2).

All the countries examined in this review have ratified ILO Conventions 100 and 111. They all have a constitutional or, in the case of the UK, quasi-constitutional equality guarantee. Several expressly mention the right to equal remuneration in the Constitutional Bill of Rights, whether as a fully enforceable right (Brazil and the EU) or a directive principle of State policy (India). All the countries also have an express statutory provision for equal remuneration for equal work for men and women.

Yet in all the countries under consideration, women are under-represented in the workforce and there is a large and stubborn gender pay gap. This is in part due to significant job segregation, with women clustered in low paid, low value jobs. In several of the countries, the formal sector is small or static, and in all countries there is a strong trend towards externalisation and casualization of work. In addition, in several countries there is a large or growing informal sector. Women tend to be over-represented in these non-regular forms of work. The patterns in South Africa are similar, particularly in relation to the powerful drive towards the use of labour brokers, casualization of work and the large informal sector. These trends create a challenging environment for the right to equal remuneration for work of equal value in ILO Convention 100.

The following summarises best practices on the basis of the countries surveyed:

*1. The aims of equal pay for work of equal value*

The principle of equal pay for work of equal value addresses a specific aspect of workplace discrimination, namely the undervaluation of work commonly done by a disadvantaged group. A paradigm case is women’s work, which is frequently undervalued for a variety of reasons, primarily because it has traditionally been done unpaid in the home, because women remain primarily responsible for child-care and domestic work, and because unionisation and collective bargaining have been difficult to achieve. It is because of the systematic undervaluation of women’s work that women are the focus of ILO Convention No. 100 and are the primary focus of legislation in all the countries under consideration, but these patterns can also be found among other disadvantaged groups.

There is also a strong business case for implementing equal pay for work of equal value. As the UK Equality and Human Rights Commission (EHRC) puts it, that ‘there are sound business as well as legal reasons for implementing equal pay. Pay systems that are transparent and value the entire workforce send positive messages about an organisation’s values and ways of working. Fair and non-discriminatory systems represent good management practice and contribute to the efficient achievement of business objectives by encouraging maximum productivity from all employees.’[[3]](#footnote-3)

ILO Convention 100 only addresses a part of the problem, namely unequal pay for work of equal value. It does not address discrimination in promotion, training, education or other aspects which keep disadvantaged groups in lower paid jobs. To genuinely address the pay gap between advantaged and disadvantaged groups, it is necessary to use equal pay legislation together with other measures to address discrimination in the workplace.

2. *The principle of equal value*:

The core element of ILO Convention No. 100 is its insistence that the right to equal pay for equal work should not be confined to equal pay for the same work, but should extend to work of equal value. Eliminating unequal pay for the same work is only the first step in the process. Where there is extensive job segregation, the problem is not that women are paid less for the same work, but that they are concentrated in undervalued feminized work. The concept of work of equal value insists that the comparison should not be limited to the content of the work, but that job requirements, such as the level of skill, effort and responsibility, and working conditions be compared.

The principle of equal value is underdeveloped in most of the countries in this review. In some countries, the legislation does not expressly refer to equal value. In others, despite an express reference to equal value, courts have taken a restrictive view, in effect reading down the right to comprise only the same or substantially similar work. It is thus of central importance that legislation gives specific guidance to the meaning of ‘equal value’ and that it is clearly differentiated from work which is the ‘same or substantially similar’.

There are several examples of good practice from the countries under review. The **Korean** Equal Employment Act specifies: ‘The criteria for work of equal value shall be skills, efforts, responsibility and working conditions, etc., required to perform the work. And in setting the criteria, an employer shall listen to opinions of the member representing the workers at the Labour-Management Council as prescribed in Article 25.’[[4]](#footnote-4) These criteria were further explicated in the major court decision on this case. According to the Court: “‘Skills’ include degrees from higher educational institutions as well as techniques acquired through previous experience. ‘Efforts’ refer to such factors as the intensity of the work, and the physical and mental effort required to accomplish tasks under time constraints. ‘Responsibilities’ refer to the scope of the job, its complexity and the extent to which the employer is dependent on the employee. Finally, ‘working conditions’ mean such issues as noise, exposure to physical or chemical threats, segregation of work and the temperature of the work place.”[[5]](#footnote-5)

The **UK** legislation specifically distinguishes between the right to equal pay for (i) like work (ii) work rated as equivalent under an employer initiated job evaluation scheme; and (iii) work of equal value.[[6]](#footnote-6) It specifies that value must be determined by reference to factors such as effort, skill and decision-making. Detailed guidance is provided by the Equality and Human Rights Commission (EHRC) on the application of the principle of equal value.[[7]](#footnote-7) Although it is not mandatory, the EHRC strongly recommends that employers undertake an equal pay audit, which involves comparing the pay of protected groups doing work of equal value, investigating the cause of any pay gaps by gender, ethnicity, disability, or working patterns; and putting in motion steps to close any pay gaps that cannot be justified on grounds other than the protected characteristics.

The **Ontario** Pay Equity Act similarly states that the value of job classes should be based on factors such as skill, effort, responsibility and working conditions.[[8]](#footnote-8) The Ontarian Pay Equity Act requires the employer to take proactive steps to institute a job evaluation scheme, and the participation of the social partners and the affected workers is crucial. Possibly the most detailed elaboration of the concept is found in the ILO Guide to gender neutral job evaluation.[[9]](#footnote-9) Best practice from these jurisdictions also strongly suggests the need for participation by the stakeholders and social partners.

Best practice therefore suggests that legislation should not only refer expressly to work of equal value, but also elaborate on the concept. It should be stated expressly, as a start, that work of equal value need not be the same work, but work which is comparable in relation to levels of skill, responsibility, effort and working conditions. Secondly, there should be clear guidance as to how to conduct an objective job evaluation system, drawing on the ILO Guide to Gender Neutral Job Evaluation. Participation by stakeholders and social partners should be essential.

The review has also shown that minimum wage setting machinery might perpetuate unequal pay for work of equal value, for example by setting lower wages for work traditionally done by women and correspondingly undervalued, as has been seen in India. Minimum wage setting bodies should therefore have the duty to apply the principle of equal value in setting minimum wages.

3. *Discriminatory job evaluation*:

Job evaluation in itself is not sufficient. Care needs to be taken to ensure that the ways in which value is set do not replicate the assumptions that have always made male work appear more valuable.

Lee shows that in **Korea**, the application of equal value principles by the Court gave too much attention to factors usually associated with male-dominated jobs, overlooking factors in female-dominated fields which should attract equal value. These include psychological aspects, stress levels caused by relationships with clients, customers or patients, frequency of interruptions of work through phone calls and interactions with other employees. She also stresses that multi-tasking skills should be considered in determining ‘intellectual’ effort. [[10]](#footnote-10)

In the **UK**, it is possible to challenge an employer-initiated job evaluation study on the basis that it is discriminatory. If this complaint succeeds, the tribunal will allow an independent job evaluation. However, the UK definition of what counts as discriminatory is unnecessarily restrictive, applying only to systems which openly set different values for men and women. In its Guidance, the UK EHRC goes further and recognises that a scheme which results in different points being allocated to jobs because it values certain demands of work traditionally done by women differently from demands of work traditionally undertaken by men would be discriminatory.

**Best practice requires that legislation should include means of assessing job values, which are independent of the employer and existing arrangements, and should require the participation of women workers affected. There should also be the possibility of challenging job evaluation schemes on the basis that they are discriminatory, directly or indirectly, on grounds of gender.**

*4. The definition of worker:*

The ILO has made it clear that the core labour Conventions apply to all workers, not just those characterised as working under a contract of employment. ILO Convention 100 refers expressly to the duty of member states to ensure the application to *all workers* of the principle of equal remuneration for men and women workers for work of equal value. Several jurisdictions in this review confine the right to ‘employees’, or ‘workers under contracts to perform personal services.’

Experience has shown, however, that if equal pay legislation is confined to ‘employees’ or workers under a contract of employment with an employer, then employers have an incentive to sidestep the legislation by re-characterising the work relationship to fall outside of the protected group. This can be done through ‘sham’ contracts, which make dependent employees appear to be independent contractors; through casualization of employment; through outsourcing or the use of agency workers and other similar means. Benjamin notes that a significant feature of the post apartheid labour market in South Africa has been the conscious adoption by many employers of strategies to avoid labour protection, initially through sham contracts which characterised employees as independent contractors and more recently through triangular agency relationships and the use of co-operatives.[[11]](#footnote-11)

Several countries in this review have found innovative ways to address this problem. Under **Brazil’s** employment laws, a person is presumed to be an employee unless proven to be an independent contractor. Moreover, the Brazilian authorities do not look at the contractual documents, but at the factual circumstances of the employment relationship. This is similar to the provision in South Africa’s amended BCEA, which provides that a person who works for or renders services to any other person, is presumed until the contrary is proved to be an employee, regardless of the form of the contract if one or more seven factors (including control, economic dependence, use of tools provided by employer) are present.[[12]](#footnote-12)

The definition in the South African Employment Equity Act is similarly potentially expansive, covering ‘(a) any person, excluding an independent contractor, who works for another person or for the state and who receives, or is entitled to receive, any remuneration; and (b) any other person who in any manner assists in carrying on or conducting the business of an employer.’[[13]](#footnote-13) However, Benjamin notes that the equivalent definition under the South African BCEA has been restrictively interpreted. [[14]](#footnote-14)

Best practice suggests that that the definition of ‘employee’ for the purposes of equal pay legislation be inclusive and broad, both to ensure that precarious and vulnerable workers are protected, and to remove the incentive on employers to re-characterise the employment relationship to avoid application of the principle of equal work for equal pay. There should be a statutory presumption that a person is an ‘employee’ for the purposes of the equal pay provisions in the EEA unless the employer can prove otherwise. Guidance should encourage a broad interpretation of the statutory definition, which, following the Brazilian example, should emphasises the factual relationship rather than the written documents.

*5. Agency and part-time workers*

Benjamin notes avoidance strategies by employers have more recently taken the form of triangular agency relationships.[[15]](#footnote-15) This mirrors the experience in the UK, where employers in several high profile cases transferred from directly employed to agency workers to avoid equal pay comparisons.[[16]](#footnote-16)

Several jurisdictions have dealt with this problem by expressly giving agency workers the right to the same pay and conditions as permanent workers.

**EU** legislation provides that the basic working and employment conditions of agency workers must be at least those that would apply if they had been recruited directly by the end user to do the same job.[[17]](#footnote-17)

**South** **Korean** legislation expressly prohibits unfavourable treatment in relation to pay and other conditions against fixed term workers. [[18]](#footnote-18)

In **Brazil**, contingent workers must receive equivalent salaries as those employees in the same occupational category at the client company. Both **South Korea** and the **EU** provide similar protection for part-time workers.

**Best practice therefore suggests that following the Brazilian, South Korean and EU examples, agency or labour broker workers should have the right to equal remuneration for work of equal value as those who are directly employed; or, alternatively, should have the right to the terms and conditions of employment, including remuneration, they would have received had they been directly employed. Similarly, part-time workers should be entitled, pro rata, to equal pay as full-time workers doing work of equal value.**

*6. Protected Grounds*

ILO Convention No. 100 specifically refers to equal remuneration for work of equal value between men and women. This is because the specific problem dealt with by Convention No. 100, namely undervaluation of work done because of the history of discrimination against a particular group, is predominantly a problem relating to women. In particular, inter alia, the facts that women have worked unpaid in the home and have been primarily the carers of children have meant that the paid work they do in the labour market has been undervalued. However, similar patterns are found amongst other disadvantaged groups, particularly in South Africa, where the history of job reservation has meant that work traditionally done by black men and women has been seriously undervalued. In addition, there are particular intersectional problems for black women, whose work is most severely undervalued both in relation to black men and white women.

The primary focus of the provisions in all the jurisdictions covered in this review is equal pay for work of equal value for men and women. However, several jurisdictions in this review include other grounds as well as women. The **Brazilian** Constitution prohibits ‘any difference in wages, in the performance of duties and in hiring criteria by reason of sex, age, colour or marital status.’[[19]](#footnote-19) In **Kenya**, the under the Employment Act an employer is obligated to pay his employees equal remuneration for work of equal value.[[20]](#footnote-20) In the **UK,** although there have always been specific provisions for determining equal pay claims between men and women, it is also unlawful to discriminate in pay arrangements in relation to other protected characteristics, such as race, disability, and sexual orientation. Nevertheless, there have been no significant cases in the UK involving the principle of equal pay for work of equal value outside of the field of gender. The UK EHRC concludes that even though this suggests that a ‘one size fits all’ approach to reducing pay inequalities across all equalities areas is unlikely to succeed, the application of good equal pay practice to other disadvantaged groups may reveal important discriminatory trends.[[21]](#footnote-21)

However, extending the principle too widely also carries risks that the central thrust of principle will be diluted and instead become a principle of ‘fair pay’, in which courts and arbitration bodies are reluctant to intervene. In **India,** an initially strong recognition of the principle of equal value under the Constitutional guarantee,[[22]](#footnote-22) was reversed when the Indian Supreme Court regarded it as ‘creating havoc. All over India different groups were claiming parity in pay with other groups e.g. Government employees of one State were claiming parity with Government employees of another State.’ Regarding it as a breach of the principle of separation of powers to intervene in the pay of workers, the Court has subsequently taken a very narrow view of the principle of ‘equal pay for equal work.’ According to Markandey J: ‘In our opinion fixing pay scales by Courts by applying the principle of equal pay for equal work upsets the high Constitutional principle of separation of powers between the three organs of the State. Realizing this, this Court has in recent years avoided applying the principle of equal pay for equal work, unless there is complete and wholesale identity between the two groups (and there too the matter should be sent for examination by an expert committee appointed by the Government instead of the Court itself granting higher pay).’[[23]](#footnote-23)

The amended South African Employment Equity Act, which includes a long list of grounds as well as ‘any other arbitrary ground’, risks such dilution unless priority is given to those groups, whose pay is undervalued because they are women or black or both. For other grounds, general measures of anti-discrimination law are more appropriate, since pay gaps are more likely to be due to discrimination in training, qualifications, access to promotion, prejudice and so on, which are available in other provisions of the Employment Equity Act.

**Best practice suggests that, while maintaining the potential for addressing pay discrimination in relation to all the enumerated grounds, the primary focus of the provision on equal pay for work of equal value, in the regulations and Guidance provided by it, should be on undervaluation of the pay of women. However, other disadvantaged groups should be included, particularly in order to maintain the possibility of claims for intersectional discrimination.**

7. *The scope of comparison*

Equal pay legislation in several of the countries considered provides that the comparator should be at the same establishment or the same employer. This means that in situations in which there is a high degree of job segregation, equal pay legislation can have no effect. There is also an incentive for the employer to use agency workers, or contract out the service to avoid a comparison.

The review has revealed are several possible responses to the problem. The first permits a comparison to be drawn between different establishments of the same employer. The **Ontarian** Employment Standards Act allows the comparison to be drawn with establishments of the same employer in the same municipality as well as with establishments which to which a worker can be transferred. The **UK** Equality Act in limited circumstances allows a comparison with employees of the same employer with the same terms and conditions, or covered by the same collective agreement. This goes some way to addressing job segregation, for example, in the public sector, where nursery nurses at a nursery could compare their work with male clerical staff working at the City Hall. However, with the decline of collective bargaining, this has proved to be an increasingly limited solution. In any event, both solutions are limited to employees of the same employer, leaving it open to the employer to fragment its business or use agency workers. The **Korean** legislation has an interesting response to this. Thus under Article 8(3) of the Korean Equal Employment Act: ‘A separate business established by an employer for the purpose of wage discrimination shall be considered the same business.’ None of these however goes as far as establishing mechanisms for industry wide comparison.

A second response deals specifically with the problem of agency workers. By transferring from directly employed workers to agency workers, an employer deprives the worker of the right to claim equal pay with other directly employed workers of the opposite sex. This can be counteracted by giving agency workers the right to equal pay with directly employed workers, as has been done in Korea, Brazil and, to a limited extent, in the UK. It is important, however, that this should be an immediate right, and that the comparison should not be limited to the same work, but include work of equal value.

A third solution is to prohibit direct and indirect discrimination on grounds of sex in relation to pay. Direct discrimination prohibits an employer A from subjecting a woman to less favourable treatment than a man would have been treated. This makes it unnecessary to identify a real comparator. **UK** race discrimination legislation has always permitted such a comparison, although in practice it has not, to the author’s knowledge, been used. The **EU** Recast Directive uses this approach too. Similarly, the Agency Workers Directive states that agency workers should be given the same pay as they would have been given had they been hired directly.

The **Ontarian** Pay Equity Act is even more adventurous. Rather than providing for an individual right to equal pay for work of equal value, it is based on the concept of a job class. Even if there is no precise comparator in the establishment doing work of equal value, the employer must ensure that the worker’s pay is proportionate to others doing work of proportionate value. This obviates the need for individual comparison, which has dogged UK equal pay litigation.

The South African draft provision refers to employees of the ‘same employer.’ It does not require that they be at the same establishment of the employer**.**

**Best practice suggests that:**

**(i) Guidance should make it clear that the comparison need not be between workers at the same establishment.**

**(ii) Hirers of agency workers should pay equal remuneration for work of equal value to all agency workers.**

**(iii) Industry wide comparisons should be used, particularly in sectors in which collective bargaining operates at sectoral level. Alternatively, the ‘proxy’ method, as developed in Ontario, should be used.**

**(iv) Specific provision is made to permit agency workers to prove that they have been paid less than they would have been paid if they were directly employed to do work of equal value.**

**(v) Proportionate pay, as developed in Ontario, should be possible of there is no comparator doing work of equal value.**

8. *Justifying equal pay*

Several jurisdictions expressly permit employers to justify unequal pay. For example, under **UK** legislation, there is no breach of the equal pay provisions if an employer can show that the difference is due to a material factor not connected to the sex of the worker. The proposed amendment providing for equal pay in the South African Employment Equity Act provides that different pay for work of equal value that is directly or indirectly based on a listed ground or any other arbitrary ground is unfair discrimination. Under the revised section 11, the employer can prove that ‘such discrimination is rational and is not unfair or is otherwise justifiable’.

Care should be taken to ensure that the justification does not in itself replicate wage discrimination, for example, by allowing employers to argue that equal pay is too costly. The **Indian** court has held that lack of affordability should not be a good excuse.

Also problematic are seniority systems, performance ratings and other practices that tend to discriminate indirectly against women. The **Ontarian** statute guards against this by providing that formal seniority systems and performance related pay can justify unequal pay only if they do not discriminate on the grounds of gender.

It is particularly important that ‘discrimination’ should include indirect discrimination. A justification which does not expressly differentiate between men and women but nevertheless has a disparate impact on women should not be acceptable unless it is necessary to achieve a legitimate aim. The **UK** Employment Act 2010 now provides that if a material factor (such as a seniority system) puts women at a particular disadvantage ( for example because they have taken time out of work to have babies), then the pay difference is not justifiable unless the practice (here the seniority system) is a proportionate means of achieving a legitimate aim.[[24]](#footnote-24) For example, if an employer seeks to justify paying part-time workers less on the grounds that they work part time, it would be relying on a material factor which puts women at a particular disadvantage when compared with men. In such circumstances, the defence cannot succeed unless the employer can show that paying part-time workers less is a proportionate means of achieving a legitimate aim.

**Best practice suggests that, where an employer argues that a difference in pay for work of equal value between a woman and a man (or other protected ground) is not unfair or otherwise justifiable:**

**(i) Lack of affordability should not in itself be a sufficient justification;**

**(ii) Any justification which particularly disadvantages women (or other disadvantaged group) should not be acceptable unless it can be shown to be a proportionate means of achieving a legitimate aim.**

9. *Levelling up or down*

One of the key points of dispute in the UK has been the decision of employers to reduce men’s pay or hold it static until women’s pay caught up. Men have been put into ‘protected categories’ which are subsequently challenged as discriminatory.

In several jurisdictions, however, the legislation expressly prevents a levelling down solution. Thus in **India**, the Act makes it clear that the employer cannot reduce the rate of remuneration in order to comply with the principle of equal pay for equal work.[[25]](#footnote-25) Indeed it goes further and provides that where the rates of remuneration before the commencement of the Act were different only on the ground of sex, then the highest of the rates are payable.[[26]](#footnote-26) Similarly, **Ontario** legislation prevents levelling down.

Best practice suggests that legislation make it clear that the employer cannot reduce the rate of remuneration in order to comply with the principle of equal pay for work of equal value.

10. *Definition of remuneration*

It is important that in defining remuneration, productivity pay and bonuses be taken into account. In the UK, even when equal value was instituted in local government in relation to basic wages, gender gaps soon reappeared because bonuses, which were primarily attached to predominantly male jobs, were left out of account.

**Best practice suggests that in interpreting ‘a difference in terms and conditions of employment’, it is made clear that non-contractual benefits such as bonuses be taken into account.**

11. *Role of collective bargaining and the social partners*.

A particularly effective method of achieving equal remuneration for equal value is through the collective bargaining process. But collective bargaining can just as well militate against the principle, if it is dominated by male unionists with vested interests.

Some countries have provision for declaring discriminatory collective agreements void. **Kenyan** law makes provision for a refusal to register collective agreements if they are not compliant with the principle of equal value. **EU law** requires member states to ensure that ‘provisions appearing in collective agreements, wage scales, wage agreements or individual contracts of employment which are contrary to the principle of equal pay shall be, or may be, declared null and void or may be amended’.[[27]](#footnote-27) The French Génisson law of 9 May 2001 takes this one step further, with an obligation for the social partners to negotiate on occupational gender equality. However, this is only effective where in areas of trade union density and needs to be complemented by other mechanisms in non-unionised areas.

**Best practice suggests that there should be a duty on the social partners to include the principle of equal value in all collective agreements.**

12. *Scope*

Several jurisdictions exclude small employers, particularly in the private sector. There seems to be no good reason to allow small employers to discriminate when large employers do not. Moreover, this creates an incentive to employers to fragment their workforces.

**Best practice suggests that that there should be no exclusion for small employers.**

13. *Enforcement mechanisms and remedies*

The countries under consideration use a variety of enforcement methods. All have their limitations.

1. Inspection combined with criminal penalties is heavily dependent on the resources the State applies to inspectors, and it is not clear that fines produce changed behaviour.
2. Individual complaints to tribunals have the advantage of giving individuals the opportunity to complain in their own right. However, this can constitute a heavy burden on individuals, depending on how costly the court or tribunal process is and how exposed they are to victimization. In addition, as the UK experience has shown, litigation based on individual comparisons can be arduous and unrewarding, since there is no impetus to correct the collective problems in the pay structure.
3. Proactive pay equity legislation similar to that in Ontario has the best potential to achieve comprehensive, systematic change. However, it is dependent on proper compliance mechanisms, requiring for example a statutory Equality Body which can apply the appropriate mix of incentives and penalties. Such incentives might include State procurement, public funding or similar financial incentives.

The South African EEA requires designated employers (i.e. employers employing more than 50 employees) to submit a statement annually or biennially on the remuneration and benefits received in each occupational category. Where disproportionate incomes are reflected in that statement, the employer must take measures to progressively reduce such differentials.[[28]](#footnote-28) The EEA also has well developed remedial procedures, including inspection, individual complaint and the requirement of compliance in order to enter into a procurement or service contract with the State or an arm of the State.[[29]](#footnote-29)

**Best practice suggests that:**

**(i) there be a requirement that employers submit an annual or biennual report recording measures taken to reduce unequal pay for work of equal value;**

**(ii) compliance with the principle of equal pay for work of equal value be required as a condition for State contracts;**

**(iii) all existing remedies be available in relation to a breach of the principle of equal pay for work of equal value.**

**Equal pay for equal work and for work of equal value**

# Introduction

This background paper provides a review of laws and best practice in relation to equal pay for equal work for men and women, in a selection of developed and developing countries which included the UK and Canada, as well as South Korea; together with India, Brazil, South Africa and Kenya. (Note that in **Canada**, the regulation of employment is a matter of provincial competence. As an example for all ten provinces, this report will focus on the laws of the province of **Ontario**.) The paper draws directly on work for the ILO on the implementation of ILO Convention 100 on equal pay for work of equal value for men and women[[30]](#footnote-30).

The review is based on material available on-line or in libraries, including: primary legislation; country reports to fulfil international human rights obligations, including the ILO; data; and secondary literature where available. Primary materials include constitutions and statutes from individual countries, where available, and some secondary materials where accessible. A sketch of salient labour force data in each jurisdiction is included in Appendix one.

One of the most important elements of ILO Convention No. 100 is its insistence that the right to equal pay for equal work should not be confined to equal pay for the same or similar work, but should extend to work of equal value. CEDAW has a similar provision in Article 11(d), which requires States Parties to take all appropriate measures to ensure ‘the right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work.’ Eliminating unequal pay for the same work is only the first step in the process. Where there is extensive job segregation, the problem is not that women are paid less for the same work, but that they are concentrated in undervalued feminized work. The concept of work of equal value insists that the comparison should not be limited to the content of the work, but that job requirements, such as the level of skill, effort and responsibility, and working conditions be compared. At the same time, care needs to be taken to ensure that the ways in which value is set do not replicate the assumptions that have always made male work appear more valuable. For example, in jurisdictions such as the UK, heavy manual work has always been valued higher than work requiring manual dexterity, such as sewing. It is therefore essential that legislation should include means of assessing job values which are independent of the employer and existing arrangements, and should require the participation of women workers affected. There should also be the possibility of challenging job evaluation schemes on the basis that they are discriminatory on grounds of sex.

Although there is a wide gender pay gap across all the countries in consideration, many countries do not have express equal pay legislation. One example is Botswana. In other jurisdictions, specific provision is made under legislation for equal pay. In **Korea**, this is found in Article 8 of the Act on Equal Employment and Support for Work-Family Reconciliation (the Equal Employment Act). In **Brazil**, legislation promulgated in 1999 prohibits, inter alia, a person’s sex from being used as a determining factor for purposes of remuneration.[[31]](#footnote-31) Notably, the remedy for breach of this provision consists of an administrative fine of ten times the highest wage paid by the employer, as well as a ban precluding the employer from obtaining loans or financing from official financial institutions.[[32]](#footnote-32) Although equal pay for work of equal value is generally confined to a comparison between men and women, occasionally, other grounds are included in the protection. The Brazilian Constitution, for example, prohibits differences related to wages, the performance of duties and hiring criteria by reason of sex, age, colour or marital status.[[33]](#footnote-33)

In **Kenya**, the Employment Act places a duty on the Minister of Labour and employers to promote equality of opportunity and eliminate discrimination in employment.[[34]](#footnote-34) Employers are prohibited from discrimination on the grounds of sex. An employer is obligated to pay its employees equal remuneration for work of equal value.[[35]](#footnote-35)

The **Indian** Equal Remuneration Act, 1976 provides that “no employer shall pay to any worker, employed by him in an establishment or employment, remuneration at rates less favourable than those at which remuneration is paid to workers of the opposite sex performing the same work or work of a similar nature.”[[36]](#footnote-36) To comply with equal pay, an employer is prohibited from reducing the rate of any worker, thereby preventing a levelling down of wages.[[37]](#footnote-37) The statute defines ‘work of a similar nature’ as “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 practical importance in relation to the terms and conditions of employment.”[[38]](#footnote-38) A ‘worker’ is a worker in an establishment or employment.[[39]](#footnote-39) ‘Employment’ is defined, as “any establishment, factory, mine, oilfield, plantation, port, railway company or shop.”[[40]](#footnote-40)

The **UK** has had equal pay legislation on the statute books since 1970, in the form of the Equal Pay Act 1970 (EqPA). This legislation, however, only came into force in 1975. Provisions for equal remuneration for work of equal value for men and women are now contained in the Equality Act 2010. Under these provisions, a woman has the right to equal pay for like work, work rated as equivalent or work of equal value with a man employed by the same employer at the same or equivalent establishment unless the employer can justify the inequality on grounds which do not directly or indirectly involve sex.[[41]](#footnote-41)

In the **Canadian province of Ontario**, the Employment Standards Act, 2000[[42]](#footnote-42) gives equal pay for equal work for men and women. Under the Pay Equity Act,[[43]](#footnote-43)private and public employers are required to establish and maintain compensation practices that provide for pay equity.[[44]](#footnote-44) Employers in the public sector or employers in the private sector with 100 employees are more that existed on January 1 1988 are bound by the Part II of the Act. Specifically they are required to have pay equity plans.[[45]](#footnote-45) By Article 12 this provides employees with information, method and reasoning on how pay equity was done in the establishment.[[46]](#footnote-46)

***Does the provision cover the same work or work of equal value? If so, how is equal value defined?***

The extent to which the jurisdictions under consideration incorporate equal value principles varies greatly. In some jurisdictions, provision is made for equal pay, but it is generally confined to equal pay for the same work, rather than for work of equal value, thus potentially violating ILO Convention 100. This is true for Nepal, where the interim Constitution prohibits discrimination in regard to remuneration and social security between men and women for the same work.[[47]](#footnote-47) The 1993 Labour Rules were even more limited, providing for equal remuneration only between male and female workers ‘engaged in work of the same nature’ in the same establishment.[[48]](#footnote-48)

Some jurisdictions now include the right to equal pay for work of equal value. However, in some cases, this is simply regarded as a synonym for like work. Thus the Filipino Labour Code defines work of equal value to mean ‘activities, jobs, tasks, duties or services—which are identical or substantially identical.’[[49]](#footnote-49) Bangladesh[[50]](#footnote-50) and Kenya[[51]](#footnote-51) do have provisions providing for equal pay for work of equal value. However, in Kenya at least, equal pay provisions only cover ‘employees’, so that they have no impact on the informal sector. Yet, as the CEDAW committee pointed out, women are concentrated in the informal sector, with no social security or other benefits.[[52]](#footnote-52) Even if the right to equal pay for work of equal value is provided, provisions frequently fail to require an objective assessment of value, an issue which the CEDAW committee repeatedly flags. Other countries still have no provision for work of equal value. One of these is Jamaica, where for several years, the ILO Committee has been asking the Government to revise section 2 of the Employment (Equal Pay for Equal Work) Act 1975 which refers only to equal pay for to “similar” or “substantially similar” work, rather than work of a different nature but equal value. In South Africa, there is no express provision for equal pay for work of equal value, on the grounds that the prohibition on sex discrimination in employment covers remuneration.[[53]](#footnote-53) A proposed amendment to the Employment Equity Act expressly providing for equal pay for work of equal value is pending before Parliament. However, as in many jurisdictions, it is limited to a comparison only with other employees of the same employer. (For further discussion about the definition of ‘employer’ see the discussion below the on scope of comparison.)

In some jurisdictions, the statute might refer to equal pay for work of equal value. The application of the principles of equal value then depend on judicial interpretation. An interesting example is that of Korea. Thus the Korean legislation reflects the principle of equal work for equal value, and this has been further elaborated by the courts. Article 8 of the Equal Employment Act states: ‘(1) An employer shall provide equal pay for work of equal value in the same business. (2) The criteria for work of equal value shall be skills, efforts, responsibility and working conditions, etc., required to perform the work. And in setting the criteria, an employer shall listen to opinions of the member representing the workers at the Labour-Management Council as prescribed in Article 25.’

There is very little literature in English on the application of the Korean principles. However, Sung Wook Lee points out that there has only been one major Court decision, in 2003, which clarified the meaning of work of equal value in this context.[[54]](#footnote-54) The decision is not available in English, but Lee provides a very helpful analysis, showing that the Court made it clear that even if the work is not identical, the value should be determined according to various factors, including skills, effort, responsibilities, working conditions required to undertake the task, education, previous experience in relevant fields, seniority of employees etc. Each of these factors was further explicated by the Court, in order to help identify uniform standards to determine equal value. Thus, according to the Court: “ ‘Skills’ include degrees from higher educational institutions as well as techniques acquired through previous experience. ‘Efforts’ refer to such factors as the intensity of the work, and the physical and mental effort required to accomplish tasks under time constraints. ‘Responsibilities’ refer to the scope of the job, its complexity and the extent to which the employer is dependent on the employee. Finally, ‘working conditions’ mean such issues as noise, exposure to physical or chemical threats, segregation of work and the temperature of the work place.”

The defendant company was engaged in the manufacture of tiles.[[55]](#footnote-55) It employed 16 male employees and 10 female employees. The manufacture process consists of 8 parts; forming, glazing, firing, sorting, packing, manufacturing and blending of glaze, ink manufacturing, and printing screen for colouring. Female employees were usually engaged in sorting processes and printing screens for colouring which required less physical effort than other processes where male employees usually work. All the employees were hired as one category, production line, and paid on a daily basis. The Supreme Court found that all employees, regardless of sex or work, were engaged in a single continuous manufacturing line. Therefore, according to the Court, although the line consisted of 8 parts, in terms of ‘working conditions,’ there were no substantial differences between the parts. The Court also found that as all employees were daily-paid and employed in fixed-term, there was no difference as regards to ‘responsibility.’ Furthermore, the Court found that in terms of ‘skill’ and ‘effort’, it could be recognized that there are some differences in the nature of the work or machine operations, and that male employees have usually engaged in more physically burdened work. Nevertheless, as the work of the male employees in this company did not require more intensive labour than production workers in general, and had not required any special skills or experience operating machines, there were no differences in ‘skill’ or ‘effort’ between male and female employees.

The Court concluded that male employees and female employees in the case had engaged in similar or substantially identical work, and that male employees could not be paid more than female employees simply because the job of the male employees required greater physical effort unless there were other just reasons. Having gone through this careful process, however, the Court held that the “equal value of work” meant identical or substantially equal work in the same establishment. Even if the job was slightly different, when the nature of the job is comparable based on objective job evaluation, the equal value of work should be recognized under the principle of equal pay for equal value of work. Whether the task includes the equal value of work will be determined by various factors, including skills, efforts, responsibilities, working conditions that are required to undertake the tasks; education; previous experiences in the relevant fields; seniority of employees. Those factors should be all taken into consideration in determining the meaning of “equal value of work.”

Although this is a helpful elaboration of the principles, Lee has two criticisms of the Court’s approach. Firstly, she rightly points out that the Court gave too much attention to factors usually associated with male-dominated jobs, overlooking factors in female-dominated fields which should attract equal value. These include psychological aspects, stress levels caused by relationships with clients, customers or patients, frequency of interruptions of work through phone calls and interactions with other employees. She also stresses that multi-tasking skills should be considered in determining ‘intellectual’ effort. Secondly, she argues, the Court paid too little attention to whether the tasks identified are actually an essential part of the job or merely incidental. For example, the job description might include heavy lifting, but in practice, the employee might spend very little time on that aspect of the job. [[56]](#footnote-56)

Despite the statute and this Court decision, the CEACR in its observations on Korea in 2008 and in 2011 notes that the Ministry of Labour’s Equal Treatment Regulation[[57]](#footnote-57) (No. 422) provides that work of equal value refers to jobs which are equal or almost equal by nature or which, although slightly different, are considered to have equal value. It called on the Korean Government to amend Regulation No. 422 to bring it into full conformity with the requirement in the Convention that it should be possible to compare work of an entirely different nature which is nevertheless of equal value.[[58]](#footnote-58) The restrictive language used by the Court has also been criticised by the CEACR, which points out that “the Supreme Court in its ruling of 14 March 2003 (2003DO2883) accepted the restrictive understanding of the concept of work of equal value in Regulation No. 422.” However, as Lee emphasises, case doctrines are very fact-specific. Moreover, the Regulations have only internal effects among the state agencies, and have no binding effects to individuals or private organizations.

The CEACR also refers to research conducted by the Ministry of Labour which emphasized the importance of the principle of equal remuneration for work of equal value and the use of job evaluation. A Workplace Self-Check Manual for Equal Pay for Work of Equal Value was being distributed to employers to use on a voluntary basis. The research also found, however, that in order to avoid the application of the principles of equal value employers responded by creating job categories to which only men or women are assigned, resulting in gender discrimination in terms of recruitment. [[59]](#footnote-59) The research and its follow up are not, however, available in English.

As in Korea, the right to equal pay for work of equal value was introduced in **Kenya** in 2007, but it is not clear that the principle is applied in practice. Section 5(4) of the Kenyan Employment Act 2007 states: ‘An employer shall pay his employees equal remuneration for work of equal value.’ Notably, this is not limited to equal pay for men and women. There is also a broad definition of "remuneration" set out in which encompasses "the total value of all payments in money or in kind" arising out of the worker's employment.[[60]](#footnote-60) The Kenyan government confirmed to the ILO CEACR in 2011 that the provision of accommodation or an accommodation allowance, and of food come within the definition of remuneration for this purpose too.[[61]](#footnote-61)

There is very little literature on the application of the concept of equal value in Kenya, but it appears that it is underdeveloped. In 2006, the pay policy for the public service submitted to the CEACR provided that “personnel in similar job positions with similar responsibilities will be remunerated in a similar manner” and that this would be ensured through criteria such as the content of the job (as determined by a job evaluation) and the skills, competencies and responsibilities associated with the position. However, the emphasis was on ‘similar’ jobs, and the policy did not refer to the need to ensure equal remuneration for men and women for work of equal value.[[62]](#footnote-62) By 2008, little progress was detected. In response to a request by the CEACR for an indication of the job evaluation methods used in the private and public sectors[[63]](#footnote-63), the Kenyan Government indicated that there was no common job evaluation method being used in either the public or the private sectors.[[64]](#footnote-64)

A similar pattern emerges in relation to minimum wages. Even where minimum wages do not openly differentiate between men and women, it is important that the wage-setting machinery takes into account the possibility that jobs traditionally done by women might be undervalued or overlooked, in comparison with skills traditionally associated with men. It is for this reason that the CEACR was not satisfied with the Kenyan Government’s submission that minimum wages were applied to all employees without distinction based on age, gender, race or colour. In its 2011 Request, the Kenyan government was asked to go further and examine the tasks involved on the basis of objective criteria, such as skills, effort, responsibility and working conditions to prevent the perpetuation of the undervaluation of women’s work.[[65]](#footnote-65) There have been no judicial decisions on the principle of equal remuneration for work of equal value.[[66]](#footnote-66)

In **India,** both the Constitution and legislation refer to equal pay for equal work, without mentioning equal value. The Indian courts initially provided a relatively wide definition of equal work, which would apply regardless of different hours of work, or employment status. However, this has been reversed in recent years. This can be seen by considering the way in which the principle of equal pay for equal work was applied by the Indian Supreme Court in a series of decisions in the 1980s,[[67]](#footnote-67) applying Articles 14 (equality before the law) and 39(d) (equal pay for equal work for men and women) of the Constitution. In a particularly extensive application of the principle, the Court granted to casual daily rated employees the same pay scale as regular employees.[[68]](#footnote-68) However, the Court rapidly pulled back from this position. In the words of Markandey Katju, J. in the 2007 case of *Chandra*: ‘the application of the principle of equal pay for equal work was creating havoc. All over India different groups were claiming parity in pay with other groups e.g. Government employees of one State were claiming parity with Government employees of another State.’ Regarding it as a breach of the principle of separation of powers to intervene in the pay of workers, the Court has subsequently taken a very narrow view of the principle of ‘equal pay for equal work.’ According to Markandey J in Chandra ‘In our opinion fixing pay scales by Courts by applying the principle of equal pay for equal work upsets the high Constitutional principle of separation of powers between the three organs of the State. Realizing this, this Court has in recent years avoided applying the principle of equal pay for equal work, unless there is complete and wholesale identity between the two groups (and there too the matter should be sent for examination by an expert committee appointed by the Government instead of the Court itself granting higher pay).’[[69]](#footnote-69)

The result was a highly restrictive interpretation of the principle of equal pay for equal work. Unless there is “complete and wholesale identity between the two groups”, there is no claim for equal pay.[[70]](#footnote-70) If the mode of recruitment, qualification, promotion, and levels of education are different, even if the workers are holding the same post, different pay scales are justified and “there cannot be any application of the principle of equal pay for equal work.”[[71]](#footnote-71) The conditions of work have to be “identical and equal and the same duties.”[[72]](#footnote-72) Moreover, the expert body and not the court is the proper forum for determining if there is complete and wholesale identity.[[73]](#footnote-73) The result was that the principle has hardly ever been applied in recent decisions, a trend reinforced by the Supreme Court in 2007 in *Chandra*.[[74]](#footnote-74)

Although Article 39(d) of the Constitution refers to equal pay for equal work for men and women, these decisions do not appear to focus particularly on equal pay for equal work for men and women, but on a general principle of fair pay. In *Chandra*, the Court held that the principle of equal pay does “not mean that all the teachers working in the school should be equated with clerks or the Government of Jharkhand for application of the principal of equal pay for equal work.”[[75]](#footnote-75) The only hint that this may be a principle in relation to sex discrimination was the statement in *Chandra*, that a successful claim for equal pay will require the claimant to demonstrate “a clear cut basis of equivalence and a resultant hostile discrimination before becoming eligible to claim rights on a par with the other group *vis-a-vis* an alleged discrimination.”[[76]](#footnote-76)

It is therefore necessary to turn to the Equal Remuneration Act 1976. Under section 4(i): ‘No employer shall pay to any worker, employed by him in an establishment or employment, remuneration, whether payable in cash or in kind, at rates less favourable than those at which remuneration is paid by him to the workers of the opposite sex in such establishment or employment for performing the same work or work of a similar nature.’ Notably, the Act makes it clear that the employer cannot reduce the rate of remuneration in order to comply with this section.[[77]](#footnote-77) Moreover, where the rates of remuneration before the commencement of the Act were different only on the ground of sex, then the highest of the rates are payable.[[78]](#footnote-78) Remuneration is defined as ‘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 employment, express or implied, were fulfilled.’[[79]](#footnote-79)

The Indian definition of the ‘same work or work of a similar nature’ nevertheless falls short of the ILO requirements to give equal pay for work of equal value. The statute defines “same work or work of a similar nature” as ‘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 practical importance in relation to the terms and conditions of employment’.[[80]](#footnote-80) The ILO CEACR has consistently held the view that this definition is too restrictive, in that the concept of equal value should go beyond ‘similar work’ and encompasses work of an entirely different nature but which is nevertheless of equal value.[[81]](#footnote-81) The Committee is also concerned that India had not fulfilled its obligations under Article 3 of the Convention to take measures to promote the objective evaluation of jobs on the basis of the work to be performed. It noted that in India, women’s remuneration was determined on the basis of classifications which did not reflect the real nature of the work involved. This is borne out by Sankaran who points out that occupations performed by women are often classified as unskilled under the Minimum Wages Act, 1948. ‘For instance, in agriculture, weeding and transplanting (performed exclusively by women in most parts of India) are so classified [as unskilled], though skill and experience is required for both activities, while other activities performed generally by men are treated as skilled work for which higher wages are paid.’[[82]](#footnote-82)

In the **UK**, legislation on equal pay dates back to the Equal Pay Act, 1970. However, the Equal Pay Act 1970 only provided for equal pay for the same or broadly similar work. Only if an employer had instituted a job evaluation scheme could equal pay for work of equal value be claimed. This, however, was in breach of EEC (now EU) law which required the principle of equal value to be applied even if the employer had not instituted a job evaluations scheme. The Equal Pay Act was therefore amended in 1981 to include the right to equal pay for work of equal value. This was consolidated in the current legislation, the Equality Act 2010, which provides that a woman has the right to equal pay for like work, work rated as equivalent or work of equal value with a comparable man and vice versa.[[83]](#footnote-83) The statute goes on to provide that A’s work is of equal value to B’s work if it is neither like B’s work nor rated as equivalent to B’s work, but nevertheless equal to B’s work in terms of the demands made on A by reference to factors such as effort, skill and decision-making. The legislation takes into account the possibility that an employer initiated job evaluation scheme might itself be based on discriminatory assumptions about the value of women’s work. It thus provides that ‘A’s work is rated as equivalent to B’s work if a job evaluation study gives an equal value to A’s job and B’s job in terms of the demands made on a worker, or would give an equal value to A’s job and B’s job in those terms were the evaluation not made on a sex-specific system. A system is sex-specific if, for the purposes of one or more of the demands made on a worker, it sets values for men different from those it sets for women.

A job evaluation study will rate the demands made by jobs rather than the nature of the jobs, thus making it possible to compare very different types of jobs. Case-law has established that, to be valid, a job valuation study must be thorough in its analysis and capable of impartial application.[[84]](#footnote-84) It must take into account factors connected only with the requirements of the job, rather than the individual person doing the job. Thus how well the person is doing the job should be irrelevant. It must assess the components of the job rather than its overall content.[[85]](#footnote-85) The Equality and Human Rights Commission (EHRC) gives detailed guidance on designing, implementing and monitoring non-discriminatory job evaluation schemes.[[86]](#footnote-86) Job evaluation is a systematic means of assessing the relative value of different jobs. Work is rated as equivalent if the jobs have been assessed as scoring the same number of points or falling within the same job evaluation grade.

A particularly effective means of achieving pay equity is by taking proactive action, through an equal pay audit, rather than waiting for individual complaints. Although it was decided not to include a statutory duty to institute a pay audit when the legislation was consolidated in 2010, the EHRC strongly recommends that employers undertake an equal pay audit, which involves comparing the pay of protected groups doing work of equal value, investigating the cause of any pay gaps by gender, ethnicity, disability, or working patterns; and putting in motion steps to close any pay gaps that cannot be justified on grounds other than the protected characteristics. The EHRC highlights at least five benefits of conducting a pay audit: (i) complying with the law and good practice; (ii) Identifying, explaining and eliminating unjustifiable pay gaps; (iii) having rational, fair, and transparent pay arrangements; (iv) demonstrating to employees and to potential employees a commitment to fairness and equality; (v) demonstrating the business’s values to clients and others.

The concept of equal value has been applied both by courts and in the collective arena. Thus in the early case of *Hayward v Cammell Laird*[[87]](#footnote-87) in 1988, a cook successfully claimed that her job was of equal value with a joiner and a carpenter in a shipyard. In a case in 2012, female care workers, cooks, school midday assistants, teaching assistants, passenger assistants, school crossings patrol workers and school technicians claimed that their jobs were of equal value to male manual workers employed in the parks and countryside, cemeteries and crematoria, street cleaning, street lighting and highways.[[88]](#footnote-88)

Court cases have, however, proved a cumbersome means to pursue equal value. Individual claims leading to individual remedies, resulting from a protracted and expensive litigation process, are unlikely to bring about widespread change. It is only where equal value has been driven through the collective process that it has stood any real chance of success. Not only can women and union representatives participate in the process of valuation to ensure that stereotypes are not replicated. In addition, the job-grading structure as a whole can be evaluated.

A particularly impressive collective bargaining achievement involved local authority manual workers, where a new rank order of jobs of about a million workers was completed in 1987, reflecting equal value principles.[[89]](#footnote-89) The new system of evaluation was carefully constructed to remove the inherent bias towards men in existing job evaluation systems. For example, ‘skill’ was extended from formal training and qualifications, to include informal training and acquired experience. Similarly, under the heading ‘working conditions’, credit was given not just for the type of dirty work undertaken by male employees, but also the kind of unpleasant conditions that care workers, such as home helps, might have to work in. The result was a radical restructuring of the grading structure. This was followed by a 1997 ‘Single Status Agreement’, which included provision for an important new job evaluation scheme embracing manual workers as well as administrative, professional, technical and clerical workers. These schemes were to be implemented locally under procedures involving representative panels of unions and employers. Equally significant is the ‘Agenda for Change Agreement’, negotiated between the National Health Service (NHS) employers and trade unions in 2004. This included a comprehensive job evaluation scheme as a result of which the greatest pay increases were experienced by the lowest paid workers – cleaners, domestics, health-care support workers and linen room and laundry assistants – who are predominantly female.

However, while these addressed basic pay, it has been much more difficult to deal with bonuses. The growth in payment systems linked to assessments of individual performance is one of the biggest areas of change in pay over the past few years. Yet, since performance related pay tends to exclude sectors where women predominate, men are the primary beneficiaries, as we have seen above, both in relation to the private and the public sectors. This has been particularly evident in local government, where gains through equal value initiatives were quickly undermined. Bonuses and productivity payments were deliberately excluded from both the local authority agreements. Indeed the 1997 Single Status Agreement, which provided expressly that existing local bonus schemes were not affected by the agreement. Yet in many situations, bonuses no longer represent genuine productivity rewards but have simply become an accepted part of pay.

This difficulty was exacerbated by lack of proper funding for equal value. The result was that by the end of 2007, only 42% of local authorities had implemented new pay and grading systems. Faced with a funding squeeze, local authority employers have threatened job cuts and pay reductions as the price for equal value settlements. The absence of proper funding makes it inevitable that equal pay claims will be represented as a cost to male workers and service users, leading to acute dilemmas for trade unions representing both constituencies.

The EqPA did originally include a limited provision dealing with collective agreements. Under section 3, a collective agreement which contained explicit references to gender could be referred by a union to the Central Arbitration Committee (CAC) for amendment. Given the wide prevalence of women-only grades, this provision was a decisive factor in the initial narrowing of the pay gap, with women's hourly pay rising from 64% of that of men's in 1971 to 74% in 1977. However, as soon as express women-only grades disappeared, the CAC could no longer intervene. In addition, the remedy entailed raising all women's pay to no more than that of the lowest male grade. This was a clumsy one, ill suited to fine-tuning complex collective agreements. For a short period, the CAC interpreted its brief more broadly to look at the collective agreement as a whole. Where differentials were disproportionately large relative to the difference in value, the CAC changed the pay rates so that they were commensurate to the proportionate value of the job.[[90]](#footnote-90) However, in a judicial review case brought by an employer in 1979, the CAC was held to have acted outside its jurisdiction.[[91]](#footnote-91) Section 3 was therefore of little further use and was repealed in 1986. Nevertheless, the way in which the CAC was able to make use of it between 1977 and 1986 constitutes a valuable model for possible reform of the current structure.

EU law requires member states to ensure that ‘ provisions appearing in collective agreements, wage scales, wage agreements or individual contracts of employment which are contrary to the principle of equal pay shall be, or may be, declared null and void or may be amended’.[[92]](#footnote-92) Amending the rule or agreement itself is potentially a very effective remedy. Thus in *Kowalska*,[[93]](#footnote-93) the ECJ, having found that a collective agreement was in breach of Article 157, held that the agreement itself should be amended.

**Ontario** has two separate pieces of legislation. The Pay Equity Act aims to ensure that women and men receive equal pay for jobs that may be very different but are of equal value. The Employment Standards Act 2000, on the other hand, aims to ensure that men and women receive equal pay for performing substantially the same job. Nevertheless, even under the Employment Standards Act, the definition of substantially the same job is relatively wide. According to s.42 of the Act, ‘No employer shall pay an employee of one sex at a rate of pay less than the rate paid to an employee of the other sex when, (a) they perform substantially the same kind of work in the same establishment; (b) their performance requires substantially the same skill, effort and responsibility; and (c) their work is performed under similar working conditions.’ ‘Equal work’ under the statute means work that is substantially the same, requiring the same skill, effort and responsibility and performed under similar working conditions in the same establishment. The jobs do not need to be identical in every respect, nor do they have to be interchangeable. However, the work needs to be similar enough that it could reasonably be considered to be interchangeable.[[94]](#footnote-94) According to the Ontario Guide to the Employment Standards Act, ‘skill’ refers to the degree or amount of knowledge, physical or motor capability needed by the worker performing the job. ‘Effort’ is the physical or mental exertion needed to perform a job” and ‘responsibility’ is measured by the number and nature of a worker’s job obligations, the degree of accountability and the degree of authority exercised by a worker in the performance of the job.[[95]](#footnote-95) Determining whether ‘working conditions’ are similar requires an examination of “such things as exposure to the elements, health and safety hazards, workplace environment, hours or work and any other terms or conditions of employment.”[[96]](#footnote-96)

Notably, the legislation prevents a levelling down of wages in order to comply with equal pay.[[97]](#footnote-97)

The Pay Equity Act is more wide-ranging, arguably providing a model of legislation in this area. Both private and public employers are required to establish and maintain compensation practices that provide for pay equity.[[98]](#footnote-98) Under Section 5.1(1) pay equity is achieved when ‘in an establishment when every female job class in the establishment has been compared to a job class or job classes under the job-to-job method of comparison or the proportional value method of comparison and any adjustment to the job rate of each female job class that is indicated by the comparison has been made.’

In its interpretation guide to the Act, the Ontario Pay Equity Commission explains the process thus: In order to achieve pay equity the employer must:

1. Determine job classes, including the gender and job rate of job classes
2. Determine the value of job classes based on factors list in section 6 of the Act: skill, effort, responsibility and working conditions
3. Conduct comparisons for all female job classes using job-to-job, proportional value or proxy method (limited to the public sector)
4. Adjust the wages of underpaid female job classes so that they are paid at least as much as an equal or comparable male job class or classes.[[99]](#footnote-99)

There are two primary methods for achieving pay equity: (i) job-to-job comparison and (ii) proportional value.

The *job-to-job method* ensures that the job rate for a female job class is at least equal to the job rate for a male job class in the same establishment where the work performed in the two job classes is of equal or comparable value.[[100]](#footnote-100) In determining the value of work, the criterion to be applied is skill, effort and responsibility required and the working conditions in which the work is performed.[[101]](#footnote-101)

A job class is defined as “those positions in an establishment that have similar duties and responsibility, require similar qualifications are filled by similar recruiting procedures and have the same compensation schedule, salary grade or range of salary rates.”[[102]](#footnote-102)A job class is female when 60% or more of the employees in that group are female[[103]](#footnote-103) or if the historical incumbency of the job class, the gender stereotypes of fields of work are female.[[104]](#footnote-104) Job rate means the highest rate of compensation for a job class.[[105]](#footnote-105)

The Act establishes a sequence for selecting the appropriate male comparator job class. First, a male job class of equal or comparable value should be identified. If more than one male comparator is found, the one with the lowest job rate should be chosen.[[106]](#footnote-106) If there is no comparable male job class, the employer must look at other male job classes in the establishment that has a lower value but is higher paid than the female job class.[[107]](#footnote-107)

If there is no male comparator group under the job-to-job method, the employer can use the *proportional value* method of comparison.[[108]](#footnote-108) Under this method the employer selects a representative group of male job classes, establishes a relationship between job values and job rates, calculates pay equity adjustments and increases wages for underpaid female job classes.[[109]](#footnote-109) All comparisons carried out under the proportional value method must be gender neutral.[[110]](#footnote-110)

The Ontario Equal Pay Commission identifies three methods for comparing jobs using the proportional value framework

1. Wage Line Approach-the employer develops a job rate line by plotting the male job class on a graph with the job rate on the y axis and the job value on the x axis. A best fit job rate line is drawn. The female job classes are plotted. Employers are required to increase the wages of all female job classes that fall below the job rate line.
2. Proportional female job classes—pay equity adjustments are given to unmatched female job classes in proportion to adjustments of female job classes that had comparators under job to job (modified groups of job approach)
3. Pay-per-points—the job value to pay relationship for the male job class is expressed as a ratio that is applied to the female job class. However, where there is more than one male job class, the pay-per-points method is less effective than the wage line method.[[111]](#footnote-111)

There is no violation of the Act where differences in wages are the result of a formal seniority system, a merit compensation plan based on formal performance ratings, employee training or development assignments that do not discriminate on the basis of gender when a position has been down-graded based on gender neutral evaluation process or when a skills shortage result in a temporary inflation of wages.[[112]](#footnote-112)

***oes the legislation include a provision for direct and indirect discrimination?***

As well as providing expressly for equal work of equal value, it is helpful to have an express provision addressing pay practices which are indirectly discriminatory, thus making it possible to challenge pay practices which have a disparate impact on women even in the context of job segregation. Direct discrimination permits the use of a ‘hypothetical comparator.’ Indirect discrimination makes it possible to challenge pay schemes which do not explicitly treat women differently, but have a disproportionate impact on women. These principles also make it possible to challenge pay practices which are discriminatory on grounds other than sex.

Several of the jurisdictions examined have indirect discrimination provisions, although in many contexts, this does not appear to have been applied to unequal pay. Thus indirect discrimination was introduced into the Korean Equal Employment Act in 1999 after it became clear that reducing direct discrimination would not be sufficient to address entrenched patterns. Thus the **Korean** Equal Employment Act defines discrimination as meaning that ‘an employer applies different hiring and working conditions to workers, or takes any other disadvantageous measures against them without any justifiable reasons on account of sex, marriage, status within family, pregnancy, or child-birth, etc. (*including cases where even if an employer applies the same hiring or working conditions, the number of men or women who can meet the conditions is considerably less than that of the opposite sex, thus causing a disadvantageous result to the opposite sex, and the said conditions cannot be proved justifiable*).’[[113]](#footnote-113) (italics added) However, according to Lee, the Korean courts have not fully embraced or applied the principle.[[114]](#footnote-114)

The **Kenyan** Employment Act 2007 prohibits both direct and indirect discrimination on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status.[[115]](#footnote-115) No definition is provided for direct or indirect discrimination.

In the **UK,** in the context of sex, there has traditionally been a strict demarcation between contractual issues, dealt with as a question of equal pay for work of equal value rather than direct and indirect discrimination, and non-contractual issues, dealt with as a matter of direct and indirect discrimination. This distinction has not, however, been established in relation to other grounds of discrimination, such as race, disability, religion or belief or sexual orientation. As Hepple points out, a person who claims that she is being paid less than a comparator because of her race, religion or belief, disability or sexual orientation can bring a claim for direct or indirect discrimination without having to prove that her work is of equal value to that of a comparator.[[116]](#footnote-116)

EU law now requires Member States to provide protection against direct discrimination in relation to pay, which would include a hypothetical comparator provision.[[117]](#footnote-117) A tentative first step in this direction has also been taken by the EA 2010, which provides that, although as a rule direct discrimination does not apply in relation to pay, it may do so if a sex equality clause (implying equal pay into the contract) ‘has no effect’.[[118]](#footnote-118) Arguably, then, direct discrimination, with its hypothetical comparator, would apply in a situation in which a sex equality clause has no effect due to the absence of an actual male comparator.[[119]](#footnote-119)

The principle of indirect discrimination in the context of pay has been dealt with in some detail by the CJEU, particularly in relation to part-time workers, who have traditionally been paid less per hour than full-time workers doing the same work or work of equal value[[120]](#footnote-120). In the seminal case of *Jenkins v Kingsgate*,[[121]](#footnote-121) it was held that where a difference in pay is not directly based on sex, but in fact disproportionally affects women, it must be justified.[[122]](#footnote-122) The standard of justification is searching: a difference can only be justified ‘if the means chosen meet a genuine need of the enterprise, are suitable for attaining the objective pursued by the enterprise and are necessary for that purpose’.[[123]](#footnote-123) Somewhat more latitude has been subsequently granted where the measure in question is a question of social policy, rather than one put in place by an individual employer. Here, rather than showing that the rule is necessary to attain a genuine need of the enterprise, the Member State must show it could ‘reasonably consider that the means chosen were suitable’ for attaining ‘a legitimate aim of its social policy’ which is unrelated to any discrimination based on sex.[[124]](#footnote-124) This descent from necessity to reasonableness has been somewhat mitigated by the ECJ’s insistence that mere generalizations are not sufficient to show that the aim is unrelated to sex discrimination, and that evidence must be provided on the basis of which ‘it could reasonably be considered that the means chosen were suitable for achieving that aim’.[[125]](#footnote-125) Moreover, the ECJ has held that a State cannot rely on the aim of restricting public expenditure to justify a difference in treatment on grounds of sex. To hold otherwise might mean that ‘the application and scope of a rule of Community law as fundamental as that of equal treatment between men and women might vary in time and place according to the state of the public finances of Member States’.[[126]](#footnote-126) Properly applied, this standard can, therefore, be exacting. In *Schönheit* in 2006, it was held that while it is acceptable to pay part-timers a pro rata pension, a measure which reduces the pension by a proportion greater than warranted by her part-time work is disproportionate and cannot be objectively justified.[[127]](#footnote-127)

The UK Equality Act 2010 includes indirect discrimination as part of the justification defence. Where a respondent argues that the distinction is not expressly based on sex, but the criterion for distinction nevertheless puts a woman at a particular disadvantage compared to a man doing equal work, the burden of justification is not discharged unless the material factor cited in defence is a proportionate means of achieving a legitimate aim.[[128]](#footnote-128) For example, if an employer seeks to justify lower pay for part-time workers on the grounds that they work part time, it would be relying on a material factor which puts women at a particular disadvantage when compared with men. In such circumstances, the defence cannot succeed unless the employer can show that paying part-time workers less is a proportionate means of achieving a legitimate aim.

***What is the scope of the comparison?***

Since much of the cause of the gender wage gap is found in job segregation, its effectiveness will be highly limited if comparisons are limited to the level of the enterprise. Moreover, there will be a temptation for the employer to ‘contract out’ work, to use agency workers, or to create separate enterprises in order to avoid equal pay comparisons. It is for this reason that the CEACR has consistently recommended that the reach of comparison should be as wide as allowed by the level at which wage policies, systems and structures are coordinated.[[129]](#footnote-129)

Nevertheless, many jurisdictions limit the comparison to the same establishment, business or enterprise. For example, the Korean Equal Employment Act provides that: Article 8: 1) An employer shall provide equal pay for work of equal value *in the same business[[130]](#footnote-130).* In its 2011 Observations on Korea, the CEACR noted that no steps had been taken by the Korean Government to institutionalize the application of the principle of equal pay for work of equal value at industry as well as enterprise level, and asked for the Government to ensure that the principle was applied beyond the level of the enterprise.[[131]](#footnote-131)

At the same time, the Korean legislation takes some innovative steps towards preventing employers from attempting to avoid the application of the principle by setting up separate businesses. Thus under Article 8(3) of the Korean Equal Employment Act: ‘A separate business established by an employer for the purpose of wage discrimination shall be considered the same business.’

The **Indian** legislation has also restricted the scope of comparison to workers of the opposite sex in the same establishment or employment.[[132]](#footnote-132)

The **UK** legislation has been similarly restrictive[[133]](#footnote-133). A woman can only claim equal pay if she is paid less than a man doing equal work and employed contemporaneously for the same employer at the same or ‘equivalent’ establishment.[[134]](#footnote-134) Not only must the comparator be employed by the same employer: he must also be at the same establishment. This severely curtails the reach of equal pay legislation. As we have seen, one of the chief causes of low pay among women is the fact that so many women work in segregated workplaces or in the lower grades of mixed professions. A woman working in a segregated workplace is unlikely to find a male comparator doing equal work for higher pay at the same establishment.

This is somewhat mitigated by permitting A to compare herself with B if B is employed by the same employer at a different establishment in situations in which ‘common terms apply at the establishments (either generally or as between A and B)’.[[135]](#footnote-135) This somewhat opaque formulation has not been easy to interpret. The clearest situation in which a woman can compare herself with a man at a different establishment of the same or associated employer is where both are covered by the same collective agreement.[[136]](#footnote-136) This is helpful in parts of the public sector where there are still collective agreements which span more than one workplace. Thus a nursery nurse, working at a nursery school with no available male comparators, could compare herself with a male clerical worker working for the same authority at the town hall, because both job classes were covered by the same collective agreement.[[137]](#footnote-137) Alternatively, it has been held that a cross-establishment comparison can be drawn where like terms and conditions would apply if men were employed at her establishment in the particular jobs concerned.[[138]](#footnote-138) However, these conditions are increasingly difficult to meet, due to the steep decline in collective bargaining, particularly in the private sector, and the technical approach of courts to the interpretation of the statutory provisions. A model for reform can be found in the comprehensive report of the Canadian Taskforce on Pay Equity, which recommended that comparisons should normally be based on all the operations of the employer. The normal rule could be modified where different operations of the same employer are carried out in different regions of the country with differing economic environments or in separate and distinct industrial sectors.[[139]](#footnote-139)

Even more problematic is the requirement that the comparator be employed by the same employer. Since the 1980s, there has been an increasing tendency to cut costs in the public sector by ‘contracting out’ services previously carried out in-house. This has led to the replacement of many public sector jobs with services provided by private contractors, particularly in low paid, predominantly female-dominated areas such as cleaning and catering. Indeed, it is their ability to cut pay rates that gives private contractors the advantage in the tendering process. The result is that low paid female cleaning or catering staff who are employed by a private contractor may work in the same establishment and do work of equal value as workers employed directly by a public employer. Yet because they are employed by a different employer, they would not be entitled to an equal pay claim.

EU law briefly signalled the promise of a wider scope of comparison. In the early case of *Defrenne*,[[140]](#footnote-140) the European Court of Justice (ECJ) held that inter-industry comparisons were too complex to give rise to directly enforceable rights without domestic legislation. Nevertheless, it left open the possibility of a comparison between employees in the ‘same service’. Later case law reaffirmed that the comparator need not be employed by the same employer. However, it very quickly withdrew the hope of a genuine broadening of the scope of comparison by substituting the need for the ‘same employer’ by a requirement that the respondent be responsible for the pay differential.[[141]](#footnote-141) Thus in *Laurence*, the ECJ held that: ‘where the differences identified in the pay and conditions of workers performing equal work or work of equal value cannot be attributed to a single source, there is no body which is responsible for the inequality and which could restore equal treatment.... The work and the pay of those workers cannot therefore be compared on the basis of [Article 141(1) EC].[[142]](#footnote-142)’

The focus on responsibility makes it impossible to address institutional or structural discrimination, which cannot be traced to the fault of any one individual. At the same time, it has the paradoxical effect of permitting deliberate avoidance by employers, who can minimize the scope for equal pay comparisons by sub-contracting and decentralizing pay structures. This was clearly demonstrated in *Allonby*,[[143]](#footnote-143) where the employer transferred its part-time lecturers, who were predominantly female, to an agency, thereby avoiding the possibility of comparison between full-time and part-time workers. The agency workers continued to do the same work at the same establishment, but on considerably worse terms and conditions. Since the employer was not formally responsible for the pay and conditions provided by the agency, it was impossible to locate a ‘single source’ which would span the two employers and therefore permit comparison between an agency lecturer and a lecturer employed directly by the employer.

**Canadian** law has been somewhat less restrictive. Under the Ontario Labour Standards Act, the comparator must be at the ‘same establishment.’ Nevertheless, two or more locations can be considered a single establishment if they are in the same municipality, or ‘one or more employees at a location have seniority rights that extend to the other location under a written employment contract whereby the employee or employees may displace another employee of the same employer.’[[144]](#footnote-144) The Ontarian Pay Equity Act, by permitting proportionate comparison, obviates the need for a comparator altogether.

One way forward would be to permit the use of a ‘hypothetical’ male comparator. Instead of pointing to a male colleague, a claimant could argue that she has been less favourably treated than a man would be. This would facilitate equal pay claims in cases of severe job segregation. An example of its use is the **Canadian** proxy method, which provides for comparison with job classes of a different employer. This is applied both in **Ontario** (albeit to the public sector only) and in **Quebec** (to both public and private sectors) and is one of the Taskforce recommendations for Federal pay equity legislation.[[145]](#footnote-145) Indeed, when the Government of Ontario attempted to repeal the proxy method, the Ontario court held that this discriminated against women in segregated public sector jobs, ‘by denying them the opportunity of quantifying and correcting the systemic gender-based wage inequity from which they suffer, a benefit the [pay equity legislation] grants to other women working in the broader public sector.’[[146]](#footnote-146)

**EU** law now requires Member States to provide protection against direct discrimination in relation to pay, which would include a hypothetical comparator provision.[[147]](#footnote-147) A tentative first step in this direction has also been taken by the Equality Act 2010, which provides that, although as a rule direct discrimination does not apply in relation to pay, it may do so if a sex equality clause (implying equal pay into the contract) ‘has no effect’.[[148]](#footnote-148) Arguably, then, direct discrimination, with its hypothetical comparator, would apply in a situation in which a sex equality clause has no effect due to the absence of an actual male comparator.[[149]](#footnote-149) Using a hypothetical comparator is clearly preferable to the ‘single source’ option, since it can apply even if there is no single source available.

A different version of the same problem arises when a woman is doing work which is admittedly of lower value than the men, but her pay is disproportionately low relative to the difference in value. Equal pay legislation only requires that ‘likes’ should be treated ‘alike’. There is no requirement that men and women be treated appropriately according to their difference. This leaves the law powerless to address the common situation in which a woman is doing work which is admittedly of less value than that of a man, but the difference in pay is disproportionately large relative to the difference in value. A claim lies only in extreme cases, where the woman is doing work of greater value but is paid less. In such a case, the ECJ has recognized that to exclude the claim would be to go against the spirit of the legislation.[[150]](#footnote-150) Thus in *Redcar v Bainbridge*,[[151]](#footnote-151) in a highly segregated workforce, female catering employees and care workers were unable to find an appropriate male comparator doing equal work. Instead, they sought to compare themselves with refuse collectors, who were on lower grades, but better paid than they were. The Court of Appeal was prepared to read words into the EqPA to make it clear that a woman could compare her pay to that of a man doing work of less value. However, the remedy was to award the woman the same pay as the man on the lower grade, instead of the higher pay which was appropriate to her grade. Moreover, this is limited to extreme cases where women are doing work of greater value. It does not deal with disproportionate pay differentials in cases in which a woman is doing work of lower value.

This can be contrasted with the approach in **Canada**, where the rigid equal treatment model has been relaxed in important ways. In particular, when directly equivalent male comparator jobs are not available within the same employment, provision may be made for proportionate pay. Under this system, the relationship between the points assigned to male job classes in a job evaluation process is determined. The same relationship is then applied to female job classes.[[152]](#footnote-152) Nevertheless, in Ontario, the Pay Equity Commission notes the Act does not permit comparisons of female and male job classes between different employers or unequal pay in gender neutral jobs. The Ontario Labour Board has noted that “pay equity is not concerned with individuals. Pay equity is only concerned with job classes and the value of those job classes as compared to other job classes.”[[153]](#footnote-153) Individuals are only entitled to equal pay for the same or similar work under The Employment Standards Act.

#### Levelling up or down?

One problematic issue which concerns the extent to which the right to equal remuneration for work of equal value could be fulfilled by lowering men’s pay to that of women’s, rather than raising women’s pay to that of men’s. In Ontario, an employer is expressly prevented from levelling down wages to achieve pay equity.[[154]](#footnote-154)

This issue has become a major source of contention in local government in the UK.[[155]](#footnote-155) A far-reaching job evaluation scheme has been agreed, promising to bring about a radical change in relation to undervalued women’s work. However, several local authorities, in the absence of appropriate government funding, threatened to reduce men’s pay instead of increasing that of women. In other words, relatively low paid men would be footing the bill to achieve equality of pay with very low paid women. This solution, not surprisingly, proved deeply unpalatable. However, instead of raising women’s pay to that of men’s, a number of local authority employers agreed to ‘protect’ the pay of the adversely affected (predominantly male) grades for periods of up to three years. The effect is simply to preserve the pay gap between men and women. This in turn led to further litigation by women, claiming equal pay with the men who were within the pay protection packages. In *Redcar v Bainbridge*,[[156]](#footnote-156) the Court of Appeal agreed that the women would have been within the protected category had they not been the subject of past sex discrimination. However, the court did not require women’s pay simply to be raised to that of men doing work of equal value. Instead, it left it open to employers to justify pay protection for male workers on the facts of the case.

Minimum wage laws too can reinforce discrimination and occupational segregation. Thus in India, minimum wages allow different rates to be fixed for skilled, semi-skilled and unskilled work. However, work done by women in agriculture is often classed as unskilled (weeding or transplanting), while work traditionally done by men (such as ploughing) is considered to be semi-skilled. This too perpetuates the wage gap. Also important is the need to ensure that minimum wages are applied comprehensively and fully enforced. Thus the ILO received a complaint in relation to the Philippines that many companies were violating the minimum wage law, particularly in industries where women predominated, such as garments, electronics and food manufacturing.[[157]](#footnote-157) The CESCR Committee also found that minimum wage legislation did not apply to some important sectors, such as government employment and export-oriented and labour intensive manufacturing.[[158]](#footnote-158)

**Who is a worker?**

A key issue is the definition of ‘worker’. Given the extent to which work, and particularly women’s work, has been casualised, it is important to ensure that equal pay legislation is inclusive. Traditional tests for who is an employee tend to be restrictive, requiring for example, a relationship of subordination and an ongoing set of mutual obligations on the employer to provide work and the worker to do the work. This could exclude precarious workers, agency workers, and other casual workers. The ILO Convention obliges Members to ensure the application of the principle of equal remuneration to ‘all workers’ but does not define ‘worker’.

Definitions of worker vary, however. Under the **Korean** statute, ‘the term “worker” means a person employed by an employer and a person having the intention to be employed.’[[159]](#footnote-159)

The **Kenyan** statute applies to all ‘employees employed by any employer under a contract of service,’[[160]](#footnote-160) but excludes the armed forces, police, the National Youth Service and, most importantly, where the employer’s dependants are the only employees in a family undertaking.[[161]](#footnote-161) Since many women are employed in family undertakings, this is a serious limitation. The Kenyan Government argues that this gap is filled by the general equality provisions in section 27 of the 2010 Constitution, namely, that “women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.”[[162]](#footnote-162) However, the CEACR rightly takes the view that these provisions are not sufficient to apply the principle of equal remuneration between men and women for work of equal value in practice. It has asked the Kenyan Government to take steps to ensure that the categories of workers excluded from the Employment Act, 2007 are nevertheless guaranteed the right to equal remuneration for work of equal value.[[163]](#footnote-163)

Under the **Indian** Equal Remuneration Act, 1976, “worker” means a worker in any establishment or employment in respect of which this Act has come into force[[164]](#footnote-164). There is no further express definition of ‘worker’. ‘Employment’ is defined, as “any establishment, factory, mine, oilfield, plantation, port, railway company or shop.”[[165]](#footnote-165) At central level, the Act is being implemented by the Central Government 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 by or under a Central Act.In respect of all employments other than those where the Central Government is the appropriate Government, the implementation rests with the State Governments.[[166]](#footnote-166)

In Brazilian labour law, there are three basic categories, attracting varying degrees of protection: **employee, independent contractor, and contingent worker**. Importantly, the factual nature of the relationship—not the contractual terms—will determine the role.[[167]](#footnote-167) **Employees** are defined by five requirements, as provided in article three of the Brazilian Labour Code. First, the employee must be an individual (i.e., a natural person). Second, an employee performs activities on a permanent and continuous—not a temporary—basis. Third, an employee is subordinate to another person. Employees receive direction and report to another person as a dependent worker. Fourth, an employee receives a salary, which is payment in return for the employees’services. Finally, an employee personally provides services. In other words, an employee cannot simply choose another person to provide the agreed upon services. Rather, the employee is the only person who provides the agreed-upon services. Fourth, an employee receives a salary, which is payment in return for the employees services. Finally, an employee personally provides services. In other words, an employee cannot simply choose another person to provide the agreed upon services. Rather, the employee is the only person who provides the agreed-upon services.

**Independent contractors** are not considered employees. They are instead independent contractors if they:

* work without supervisors’ directions or company regulations;
* perform work autonomously;
* do not perform continuous or permanent work;
* provide services without exclusivity;
* can provide services through other persons;
* work outside of a set schedule or required working hours;
* provide services off the premises of the contracting company;
* use their own work material and equipment;
* do not receive benefits; and
* receive only agreed-upon fees for services provided.

Under Brazil’s employment laws, a person is presumed to be an employee unless proven to be an independent contractor.

**Contingent workers** are strictly defined by Federal law 6.019/74, which allows for contingent work agreements in only two situations. First, contingent workers are permitted to temporarily replace a regular employee who is on temporary leave. Second, contingent workers are allowed if an employer is experiencing an unusual and temporary increase in the company’s workload—only for a temporary period of time.

 Contingent work firms usually supply contingent workers; contingent workers have protection as employees that attach to their employment relationship with the contingent work firm under the Brazilian Labour Code. In addition, contingent workers must receive equivalent salaries as those employees in the same occupational category at the client company.

 The limit for a contingent worker’s duration is three months, subject to a one-time, three-month renewal with Labour Ministry approval. The maximum time period for contingent workers is six months, at which time the worker must be treated as an employee.

 Irregularities in the employment relationship with contingent workers increase the risk of administrative penalties and civil court claims against the company. In the event of a dispute, the Brazilian authorities will in practice examine the facts of a situation and will find an employment relationship if the characteristics of such a relationship exist.

 Strict enforcement threatens any company that does not comply with the existing laws. Firm definitions of the employment roles make it difficult for companies to avoid the responsibilities of an employer-employee relationship if the facts support such a relationship.

The **UK** legislation applies to employment under a contract of employment, a contract of apprenticeship or a contract to do work personally (i.e. the work cannot be delegated to another to do). [[168]](#footnote-168) This is deliberately wider than the general employment law, such as that of unfair dismissal, which applies only to employees under a contract of service, which in turn requires a measure of control, integration or dependency. The question of who is a worker is also governed by EU law, which, as we have seen, is binding on the UK. In the case of *Allonby v Accrington*, which concerned agency workers, the ECJ held that because the rights to equal pay and equal treatment ‘form part of the foundations of the Community’, the concept of worker “cannot be interpreted restrictively”:[[169]](#footnote-169) It went on to say that a worker is a person ‘who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration.’[[170]](#footnote-170) Importantly, this meant that a person who was employed by an agency under a contract for services, was covered by the principle of equal treatment. Notably, and in contrast with the Kenyan legislation, the British Equality Act also applies to the civil service employment as a member of House of Commons or House of Lords staff, and service in the armed forces.[[171]](#footnote-171)

The **Ontarian** legislation has a wide definition of employee. Under the Employment Standards Act, 2000, any person who performs work for an employer for wages, who supplies services to an employer for wages, who receives training from an employer and who is a home-worker is an employee.[[172]](#footnote-172) An employer is “an owner, proprietor, manager, superintendent, overseer, receiver or trustee of an activity, business, work, trade, occupation, profession, project or undertaking who has control or direction of, or is directly or indirectly responsible for, the employment of a person in it, and any persons treated as one employer.”[[173]](#footnote-173) The Pay Equity Act covers part-time or casual employees who work at least one third of the normal work period, part-time or casual employees who work on a regular and continuing basis, although less than a third of the normal work period, and seasonal workers.[[174]](#footnote-174) An employee is defined only as someone who is not a student employed during their vacation.[[175]](#footnote-175)

Some jurisdictions address the increasing informality of the labour market by making special provision for irregular workers. This is discussed further below.

**Who is the employer?**

Despite the fact that unequal pay might be particularly problematic, some jurisdictions exempt small businesses from the application of equal pay laws. Thus the regulations enforcing the **South Korean** Equal Employment Act exempt businesses with fewer than five workers from the equal pay provisions in Article 8 of the relevant legislation.[[176]](#footnote-176) Similarly, many jurisdictions exempt family workers and domestic workers. In South Korea, businesses or workplaces consisting of blood relatives residing together are exempt, as are housekeepers.[[177]](#footnote-177) Similarly, the Ontarian Pay Equity Act only applies to private sector employers who employ 10 or more employee. It does, however, apply to all public sector employers regardless of size and to employees’ bargaining agents.[[178]](#footnote-178)

One of the most problematic aspects of the modern flexible workforce, both in developed and developing countries, is the need to determine who should be responsible for ensuring equal pay. When there are multiple employers, such as in agency work, workers have often fallen between the gaps, with the result that it has even been held that an agency worker had no employer. One interesting way forward is found in the British Employment Act 2010, in relation to occupational pension schemes, which are deemed to include a non-discrimination rule.

Under the British Employment Act, 2010, every occupational pension scheme must be taken to include a non-discrimination rule. This prohibits a ‘responsible person’ from discriminating against a member of the scheme. A responsible person includes such as trustees or manages of the scheme, employers whose employees are or may be members of the scheme, and persons responsible for appointing those persons to office. [[179]](#footnote-179)

1. Many thanks to Meghan Campbell for her helpful research assistance and to Frances Raday for her valuable comments. [↑](#footnote-ref-1)
2. S. Fredman Background Paper For The World Development Report 2013 *Anti-discrimination laws and work in the developing world: A thematic overview;*  S. Fredman Literature Review on the Enforcement of ILO Convention 100: Report prepared for the ILO and the South African Government Feb 2013; [↑](#footnote-ref-2)
3. UK Equality and Human Rights Commission *Equal Pay Act 2010 Code of Practice* para 10 <http://www.equalityhumanrights.com/uploaded_files/EqualityAct/equalpaycode.pdf> accessed 14 March 2013 [↑](#footnote-ref-3)
4. Article 8(2) [↑](#footnote-ref-4)
5. Supreme Court of Korea (Mar. 14, 2003) 2002 Do 3883. See Lee p.126 [↑](#footnote-ref-5)
6. UK Equality Act 2010, ss 64 - 80 [↑](#footnote-ref-6)
7. <http://www.equalityhumanrights.com/advice-and-guidance/tools-equal-pay/equal-pay-audit-toolkit/carrying-out-an-equal-pay-audit/> accessed 13 Mar 2013 [↑](#footnote-ref-7)
8. Ontario Pay Equity Act s.6 [↑](#footnote-ref-8)
9. <http://www.ilo.org/declaration/info/publications/eliminationofdiscrimination/WCMS_122372/lang--en/index.htm> (accessed 14 March 2013) [↑](#footnote-ref-9)
10. Lee, p127 [↑](#footnote-ref-10)
11. Benjamin ‘Informal Work and Labour Rights in South Africa’, [2008] 29 Indus. L.J. 1579 at p1581 - 2 [↑](#footnote-ref-11)
12. South African BCEA s.83A [↑](#footnote-ref-12)
13. South African Employment Equity Act 1998, s.1 [↑](#footnote-ref-13)
14. Benjamin ‘Informal Work and Labour Rights in South Africa’, [2008] 29 Indus. L.J. 1579 at p1581 - 2 [↑](#footnote-ref-14)
15. Benjamin ‘Informal Work and Labour Rights in South Africa’, [2008] 29 Indus. L.J. 1579 at p1581 - 2 [↑](#footnote-ref-15)
16. Allonby v Accrington [2004] IRLR 224 ECJ [↑](#footnote-ref-16)
17. EU Directive 2008/104/EC [↑](#footnote-ref-17)
18. Korean Fixed-term and Part-Time Employees Protection Act 2006 [↑](#footnote-ref-18)
19. Constituiton of Brazil, Title II, Chapter II, Article 7, XXX [↑](#footnote-ref-19)
20. ibid. Article 5(5). [↑](#footnote-ref-20)
21. UK EHRC ‘Equal pay in practice checklist: Race and Ethnicity’ http://www.equalityhumanrights.com/advice-and-guidance/tools-equal-pay/checklists-equal-pay-in-practice/17-pay-and-ethnicity/ (accessed 13 March 2013) [↑](#footnote-ref-21)
22. Dhirendra Chamoli and Anr. v. State of U.P. MANU/SC/0338/1985 : (1986)ILLJ134SC , Surinder Singh v. Engineer-in-Chief, C.P.W.D. MANU/SC/0506/1986 : (1986)ILLJ403SC , Randhir Singh v. Union of India MANU/SC/0234/1982 : (1982)ILLJ344SC etc. [↑](#footnote-ref-22)
23. *S.C. Chandra v Statke of Jharkhand* (2007) SCC 279 para 13 [↑](#footnote-ref-23)
24. EA 2010, s 69(1)(b), (2); this mirrors the proposals in ibid at p 206. (This applies equally to men). [↑](#footnote-ref-24)
25. Indian Equal Remuneration Act 1976, s4(2) [↑](#footnote-ref-25)
26. Indian Equal Remuneration Act 1976, s4(3) [↑](#footnote-ref-26)
27. Council Directive 75/117 EEC, Article 4 [↑](#footnote-ref-27)
28. EEA s.27 [↑](#footnote-ref-28)
29. EEA s.53 [↑](#footnote-ref-29)
30. S. Fredman Background Paper For The World Development Report 2013 *Anti-discrimination laws and work in the developing world: A thematic overview;*  S. Fredman Literature Review on the Enforcement of ILO Convention 100: Report prepared for the ILO and the South African Government Feb 2013; [↑](#footnote-ref-30)
31. Brazilian Act No. 9.799 of 26 May 1999, section 373(A)(III) [↑](#footnote-ref-31)
32. Brazilian Act No. 9.799 of 26 May 1999, section 401(B) [↑](#footnote-ref-32)
33. Brazilian Constitution 1988 Article 7, s.30. [↑](#footnote-ref-33)
34. The Employment Act (Cap 226) Article 5(1) and 5(2). [↑](#footnote-ref-34)
35. ibid. Article 5(5). [↑](#footnote-ref-35)
36. Equal Remuneration Act, 1976, Article 3(1). [↑](#footnote-ref-36)
37. ibid Article 3(2). [↑](#footnote-ref-37)
38. ibid Article 2. [↑](#footnote-ref-38)
39. ibid Article 2. [↑](#footnote-ref-39)
40. The Equal Remuneration Act, 1976 imports the definition of employment from The Payment of Gratuity Act, 1972 Article 2. [↑](#footnote-ref-40)
41. UK Equality Act 2010, ss 64-80 [↑](#footnote-ref-41)
42. S.O. 2000, Chapter 41. [↑](#footnote-ref-42)
43. R.S.O. 1990, CHAPTER P.7 [↑](#footnote-ref-43)
44. ibid section 7 (1). [↑](#footnote-ref-44)
45. ibid sections 11 and 13. [↑](#footnote-ref-45)
46. Ibid., sections 13 and 21.6. [↑](#footnote-ref-46)
47. Nepal Interim Constitution 2007, Article 13(4). [↑](#footnote-ref-47)
48. Labor Rules, 2050 (1993), Rule 11. [↑](#footnote-ref-48)
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