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ANTIDISCRIMINATION LAWS AND THE GLOBAL WORKPLACE: COMPARATIVE STUDY OF EQUAL RIGHTS THEORY FOR WOMEN

Ivneet Walia
Assistant Professor of Law
Rajiv Gandhi National University of Law
Patiala, India

Abstract- The globalization of business, communications, the economy, and culture create both a climate and increased opportunities to consider workplace law beyond our borders. Many of the major human rights instruments such as the Universal Declaration of Human Rights; the International Covenant on Economic, Social and Cultural Rights which contains a catalog of important rights for workers including the right to work, just and favorable workplace conditions, an adequate standard of living, equal pay, a safe and healthy work environment, reasonable limits on working hours, and sufficient rest and leisure and the International Covenant on Civil and Political Rights: the Covenant prohibits discrimination, slavery, servitude, and forced labor and also protects the right to form and join trade unions etc. Self-regulation is ubiquitous on the international scene too, driven by the actions of Transnational Companies. Among the most interesting and controversial forms of self-regulation are voluntarily adopted, global codes of conduct that seek to promote international labor rights and standards. The International Labor Organisation's work in setting international labor standards provides an important lens through which to view all the other legal regimes that attempt to regulate the workplace. Having set the stage, the paper then proceeds by reviewing labor and employment law in three important regions: North America; Europe; and Asia. It concludes with a look at attempts by at self-regulation.

Keywords: Workplace, Labor Law, Rights, Globalzation, ILO

I. Introduction

Changes in the economy and methods of production, trade liberalization, and improvements in technology and communication affect the workplace and the efficacy of the legal systems that were designed to regulate it. In order to represent a broad range of clients, and when necessary collaborate with lawyers from other countries, advocates for employers and employees alike benefit from a familiarity with labor and employment laws outside their borders. Acquaintance with international and foreign national law also promotes reflection on the effectiveness of regulatory systems back home, and can produce important insights about one's own workplace laws, an especially helpful exercise for policy makers. Antidiscrimination jurisprudence started with equal pay for equal work for male and female workers, it should be no surprise that there is a large number of decisions dealing with that problem. Sex discrimination is broadly categorized as direct discrimination: where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation, indirect discrimination: where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary, harassment: where an unwanted conduct related to the sex of the person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating, or offensive environment, sexual harassment: where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of the person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment[1].

International workplace law falls into two categories: Public and Private

Public: The former encompasses the human rights of workers, and necessitates identifying which labor rights should be considered universally guaranteed. An overlapping component of public international workplace law is the so-called international labor code comprised of the ILO's conventions and recommendations. Public international workplace law, under our expansive definition, also includes trade and regional agreements between sovereign states that contain provisos on labor issues and reference core labor standards, agreements that are often referred to as bilateral, multilateral, or supranational rather than international. Examples of such instruments include the North American Free Trade Agreement's side agreement on labor cooperation and the labor-themed provisions of the treaties, protocols, and directives structuring the European Union.

Private: Private international workplace law is perhaps best understood by using as a theoretical touchstone a conception of law advocated by legal pluralists. Legal pluralism views law as generated by both state and nonstate sources, and is especially concerned with the examination of non-state legal systems and their relation to government. TNCs are arguably the most active non state, law-generating actors. Thus their actions, as creators of regimes of private ordering – webs of rules that affect employees collectively and individually are especially worthy of attention. Self-regulation is ubiquitous on the international scene too, driven by the actions of TNCs. Among the most interesting and controversial forms of self-regulation are voluntarily adopted, global codes of conduct

that seek to promote international labor rights and standards[2].

Human rights law dates to the immediate aftermath of World War II. A field of international law articulated in response to the atrocities perpetrated during that war, it exists to protect groups and individuals from violations of their internationally guaranteed rights.

- Human Rights fall into two general categories: civil and political rights; and economic, social and cultural rights.

The First Category- Civil and Political Rights- includes the right to life, liberty, the prohibition of torture, the right to a fair trial, privacy, and property, and freedom of speech, religion, and assembly.

The Second Category- Economic, social and cultural rights, such as the right to work, just and favorable conditions of work, social security, an adequate standard of living, medical care, and education

- Many of the major human rights instruments
  - the Universal Declaration of Human Rights;
  - the International Covenant on Economic, Social and Cultural Rights (ICESCR); contains a catalog of important rights for workers including the right to work, just and favorable workplace conditions, an adequate standard of living, equal pay, a safe and healthy work environment, reasonable limits on working hours, and sufficient rest and leisure.
  - the International Covenant on Civil and Political Rights (ICCPR): the ICCPR prohibits discrimination, slavery, servitude, and forced labor and also protects the right to form and join trade unions.

All three of the instruments mentioned detail rights that implicate the workplace, for example, identify freedom of association, an essential aspect of workplace collective activity, as a fundamental right.[3]

- The ILO, a specialized agency of the United Nations has played a major role in facilitating the process of identifying which workers' rights are to be considered human rights.

The ILO was also founded on the principle that advancing social justice is a key element to establishing lasting peace. To those ends, the ILO's role is to promulgate international standards for implementation by its member nations, mainly by adopting, as will be described later, conventions and recommendations.

Guiding the work of the agency at its inception were nine principles of special importance set forth in Article 427 of the Treaty of Versailles. The list included a statement that labor should not be regarded as a commodity or article of commerce, recognition of employees' freedom of association, endorsement of the eight-hour workday or forty-eight hour workweek standard, and an admonition that men and women should receive equal pay for work of equal value.

- The *Declaration on Fundamental Priciples and Rights at Work* is essentially a pledge by ILO members to respect, promote, and realize the following rights and principles:
  1. Freedom of association and the effective recognition of the right to collective bargaining;
  2. The elimination of all forms of forced or compulsory labor;
  3. The effective abolition of child labor; and
  4. The elimination of discrimination in respect of employment and occupation.

Believing that experience has fully demonstrated the truth of the statement in the Constitution of the International Labour Organization that lasting peace can be established only if it is based on social justice;

a) all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity;
b) the attainment of the conditions in which this shall be possible must constitute the central aim of national and international policy;[4]

United States

U.S. labor and employment lawyers are just beginning to familiarize themselves with labor and employment law in the international realm. This is not because international workplace law is a new legal development; rather, it is because until recently, it was not viewed as a tool that could be used by American advocates and policy makers. As noted earlier, labor and employment law practitioners' interest in things international has in the last decade begun to grow. The globalization of business, communications, the economy, and culture create both a climate and increased opportunities to consider workplace law beyond our borders.[5]

There are two principal theories of discrimination, which are recognized under Title VII, the ADEA, and the ADA: disparate treatment and disparate impact. In the most often-quoted explanation of these two theories and the differences between them, the U.S. Supreme Court stated as follows:

"Disparate treatment" such as is alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. . . . Undoubtedly, disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII. ("What the bill does . . . is simply to make it an illegal practice to use race as a factor in denying employment. It provides that men and women shall be employed on the basis of their qualifications, not as Catholic citizens, not as Protestant citizens, not as Jewish citizens, not as colored citizens, but as citizens of the United States"). Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of

discriminatory motive, we have held, is not required under a disparate-impact theory. Either theory may, of course, be applied to a particular set of facts. By contrast, disparate-impact claims "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.[6]"

Canada

All Canadian jurisdictions "prohibit discrimination on grounds of race, color, national or ethnic origin, place of origin, age sex, marital status, physical disability, religion or creed, and mental disability." Pregnancy discrimination is either expressly prohibited or found to be discrimination because of sex. Some jurisdictions go further and prohibit discrimination on such grounds as political beliefs, criminal convictions, alcohol and drug addiction, family and civil status.

The Canadian Charter of Rights and Freedoms has played an important part in the development of employment discrimination law. Section 15 sets forth the Equality Rights provision:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individual or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Although the Charter applies directly only to government action and not to private employers, it has been used to challenge human rights statutes as being "under-inclusive. In *Vriend v.Alberta*, the Court ruled that the Alberta human rights statute must be read to prohibit discrimination on the ground of sexual orientation, even though the Alberta legislature had expressly declined to include it. The use of this "under-inclusion" theory has the effect of reading Charter rights into the human rights statutes thereby making them applicable to private employment.[7]

Mexico

Article 123, Section B, Article VII of the Mexican Constitution establishes an equal pay standard: "Equal wages shall be paid for equal work, regardless of sex or nationality." Furthermore, Article 3 of the Federal Labor Law, as part of its general humanistic definition of work, prohibits discrimination: "No distinction shall be established among the workers by reason of race, sex, age, religious creed, political doctrine or social condition." Also, Article 56 of the Federal Labor Law restates the prohibition on discrimination: "In no event shall working conditions be inferior to those established by the Federal Labor Law and they shall be commensurate to the importance of the services and equal for equal work. No distinction may be established by reason of race, nationality, sex, age, religious creed or political doctrine, except for the distinctions expressly set forth in this law."[8]

United Kingdom

Employment antidiscrimination law began developing later in the United Kingdom than in the United States. It also began with a different emphasis. The Equal Pay Act 1970, focusing on equality of pay for women and men, was the seminal employment discrimination legislation in the United Kingdom. Although the United States passed the Equal Pay Act in 1963, and sex was included as a prohibited ground of discrimination in the Civil Rights Act of 1964, the focus of U.S. employment discrimination law, at least in its early stages, was on race discrimination. Race discrimination did not become a major issue in the United Kingdom until the passage of the Race Relations Act 1976 (replacing the Acts of 1965 and 1968).

Germany

Antidiscrimination law is set forth in a number of different laws, including the Constitution and a number of statutes, which make somewhat of a patchwork. The German Constitution prohibits employment discrimination because of gender, race, language, homeland, national origin, beliefs, religion, and political views. Article 3 provides:

1. All persons shall be equal before the law.
2. Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages.
3. No person shall be favored or disfavored because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavored because of disability.

European Union

EU law against discrimination began with the protection of equal rights for women with Article 119 of the original Treaty. That law has continued to expand in terms of the scope of protection given women but also in terms of adding new protected classes. The Treaty of Amsterdam amended Article 2 of the EC Treaty to include among the tasks of the Community the promotion of "equality between men and women" and amended Article 3(2) by providing that the Community "shall aim to eliminate inequalities, and to promote equality, between men and women." Moreover, the Amsterdam Treaty added Article 13, which reads:

Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Article 141 now provides:

1. Each Member State shall ensure that the principle of equal pay for male and female workers or equal work or work of equal value is applied.
2. For the purpose of this Article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer. Equal pay without discrimination based on sex means:

a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;
b) that pay for work at time rates shall be the same for the same job.

3. The Council, acting in accordance with the procedure referred to in Article 251, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.
4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

The following directives have been based on that expanding authority and reflect the xpansion of EU antidiscrimination law that must be transposed by the Member States so that their naitonal laws conform:

- 1975: relating to the application of equal pay for men and women[11];
- 1976: relating to the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions[12]
- 1978: concerning the progressive implementation of the principle of equal treatment for men and women in matters of social security[13]
- 1986: on the implementation of the principle of equal treatment for men and women in occupational social security schemes[14]
- 1997: on the burden of proof in cases of discrimination based on sex[15]
- 2000: establishing a general framework for equal treatment in employment and occupation;[16]
- 2000: implementing the principle of equal treatment between persons irrespective of racial or ethnic origin[17]

II. Equal Pay for Work of Equal Value

Given that EU antidiscrimination jurisprudence started with equal pay for equal work for male and female workers, it should be no surprise that there is a large number of decisions dealing with that problem. The earliest case of significance is *Defrenne v. Societe Anonyme Belge de Navigation Aerienne Sabena,* (1976), in which a flight attendant for Sabena Airlines alleged gender discrimination by invoking the right to equal pay for equal work directly under Article 119, what is now Article 141 of the EC Treaty. The Court found that the equal pay for equal work provisions of the Treaty were directly enforceable where a plaintiff demonstrates "direct discrimination," that is, "that men and women receive unequal pay for equal work carried out in the same establishment or service."

In *Murphy v. Bord Telecom Eireann,* (1988), plaintiffs showed their work was of greater value than the work done by more highly paid men. They won: If the principle of equal pay for equal work "forbids workers of one sex engaged in work of equal value to that of workers of the opposite sex engaged in work of equal value to that of workers of the opposite sex to be paid a lower wage than the latter on grounds of sex, it *a fortiori* prohibits such a difference in pay where the lower-paid category of workers is engaged in work of higher value." Article 141 now also includes an expanded definition of the duty of employers. No longer is the duty limited to equal pay for the same work, but now the duty includes the duty of equal pay for work of equal value. In the United States, this has come to be known as "comparable worth" that is not within the scope of the Equal Pay Act of 1963, 29 U.S.C. section 206(d)(1).

III. Sex Discrimination in Employment

In *Defrenne v. Societe Anonyme Belge de Navigation Aerienne Sabena,* (1976), the Court, however, held that Article 119 applied only to discrimination as to pay, not to her claims that she was forced to retire at age forty while flight stewards were not. Had Belgium implemented the Directive 76/207 by the time of Defrenne's discharge, her forced retirement could have been challenged. Article 1 established the principle of equal treatment in hiring, promotion, working conditions and vocation training. Article 2(1) includes discrimination based on "marital or family status" with the proscription of the Directive. Article 1(2) of Directive 2002/73/EC defines sex discrimination quite broadly:

- direct discrimination: where one person is treated less favorably on grounds of sex than another is, has been or would be treated in a comparable situation,
- indirect discrimination: where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary,
- harassment: where an unwanted conduct related to the sex of the person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating, or offensive environment,
- sexual harassment: where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of the person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.

Article 4(1) of the Directive 97/80/EC shifts the burden of proof in discrimination cases to the defendant once a prima facie case of discrimination has been established: "Member

States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment."[18]

France

French law classified employment discrimination as a crime sanctionable by incarceration and fines, and it did not establish an agency like the Equal Employment Opportunity Commission in the United States. The further development of sexual harassment law in France will be interesting to observe. The Court de Cassation approved an employee's engaging in sexual harassment as a genuine and serious ground for termination[19].

IV. Conclusion

A central focus of the corporation litigation is whether in allegedly allowing substandard working conditions to flourish in the factories of its suppliers, the company breached the agreements it had with those suppliers, which require them to adhere to Company's Code of Conduct. Among the most interesting and controversial forms of corporate self-regulation is the voluntarily adopted global code of conduct, which seeks to govern the worldwide activities of TNCs and, in some cases, those with whom they contract. requires its suppliers, and their subcontractors, to meet the following standards, and reserves the right to make periodic, unannounced inspections of suppliers' facilities and the facilities of suppliers' contractors to ensure suppliers' compliance with these standards:

1) Compliance with applicable laws and practice

Suppliers shall comply with all local and national laws and regulations of the jurisdictions in which the suppliers are doing business as well as the practices of their industry.

2) Employment conditions

The following are specific requirements relating to employment conditions: Compensation Suppliers shall fairly compensate their employees by providing wages and benefits that are in compliance with the local and national laws of the jurisdictions in which the suppliers are doing business or which are consistent with the prevailing local standards in the country if the prevailing local standard is higher.

3) Hours of Labor

Suppliers shall maintain employee work hours in compliance with local standards and applicable laws of the jurisdictions in which the suppliers are doing business. Employees shall not work more than 72 hours per 6 days or work more than a maximum total working hours of 14 hours per calendar day (midnight to midnight). Supplier's factories should be working toward achieving a 60-hour work week

4) Freedom of Association and Collective Bargaining

Suppliers will respect the rights of employees regarding their decision of whether to associate or not to associate with any group, as long as such groups are legal in their own country. Suppliers must not interfere with, obstruct or prevent such legitimate activities.

5) Workplace environment

Factories producing merchandise to be sold by organization shall provide adequate medical facilities and ensure that all production and manufacturing processes are carried out in conditions that have proper and adequate regard for the health and safety of those involved etc.

All this will help to adhere to the International Labor codes aims and objectives.

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