

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

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I. INTRODUCTION

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

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

2. Pat Armstrong & Mary Cornish, *Restructuring Pay Equity for a Restructured Work Force: Canadian Perspectives*, in 4 GENDER, WORK & ORGANIZATION 67 (1997).

3. Mary Cornish, Fay Faraday & Veena Verma, *Securing Gender Justice: Challenges Facing International Labour Law*, in JOHN D.R. CRAIG & S. MICHAEL LYNK, GLOBALIZATION AND THE FUTURE OF LABOUR LAW 377 (2006).

While there appears to be widespread consensus that closing the global gender pay gap is essential, as demonstrated with ILO equality Conventions 100 and 111 among the most widely ratified, pay equity continues to be one of the most violated labor and human rights standards.⁴ Some scholars have argued that pay equity as implemented in North America is not worth the effort given its limited impact and the complexity, costs, and delays in its implementation.⁵ Other scholars, including this author, as well as international institutions such as the ILO and the United Nations (UN) argue that pay equity is a fundamental human right of women requiring constant renewal and adaptation to address the diverse and constantly evolving conditions of women's work.⁶

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

4. MARIE-THERÈSE CHICHA, A COMPARATIVE ANALYSIS OF PROMOTING PAY EQUITY: MODELS AND IMPACTS. WORK IN FREEDOM (International Labour Organization, 2006), available at http://www.ilo.org/dyn/declaris/DECLARATIONWEB.DOWNLOAD_BLOB?Var_DocumentID=6596.

5. JUST WAGES: A FEMINIST ASSESSMENT OF PAY EQUITY (Judy Fudge & Patricia McDermott eds., 1991) [hereinafter JUST WAGES]; Margaret Hallock, *Pay Equity: The Promise and Practice in North America*, 10 LAB. & INDUS. 53 (1999); NITYA IYER, WORKING THROUGH THE WAGE GAP: REPORT OF THE TASK FORCE ON PAY EQUITY (Commissioned by the British Columbia Government, 2002).

6. Armstrong & Cornish, *supra* note 2; Pat Armstrong, Mary Cornish & Elizabeth Millar, *Pay Equity: Complexity and Contradiction in Legal Rights and Social Processes*, in CHANGING CANADA: POLITICAL ECONOMY AS TRANSFORMATION ch. 7 (Wallace Clement & Leah F. Vosko ed., 2003); PAY EQUITY, A NEW APPROACH TO A FUNDAMENTAL RIGHT: PAY EQUITY TASK FORCE FINAL REPORT (2004) [hereinafter PAY EQUITY]; CHICHA, *supra* note 4; Jill Rubery, Damian Grimshaw & Hugo Figueiredo, *How to Close the Gender Pay Gap in Europe: Towards the Gender Mainstreaming of Pay Policy*, 36 INDUS. REL. J. 184 (2005); ILO, DIRECTOR-GENERAL, TIME FOR EQUALITY AT WORK: GLOBAL REPORT UNDER THE FOLLOW-UP TO THE ILP DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK (International Labour Conference, 91st Sess., Report I(b), 2003).

7. Armstrong & Cornish, *supra* note 2; Cornish, Faraday & Verma, *supra* note 3.

8. ILO, *supra* note 6.

women's pay in both developed and developing countries?⁹ Ongoing research and analysis is necessary to inform and sustain the implementation process.

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

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

10. Armstrong & Cornish, *supra* note 2; Judy Fudge & Leah Vosko, *Gender Paradoxes and the Rise of Contingent Work Towards a Transformative Political Economy of the Labour Market*, in *CHANGING CANADA: POLITICAL ECONOMY AS TRANSFORMATION* 183 (Wallace Clement & Leah Vosko eds., 2003).

burdens women face of reconciling work and family life and the need to value the unpaid work women do will come to the foreground.¹¹

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

It is necessary to always factor in the fundamentally political nature of pay equity. Securing pay equity rights for women challenges the power dynamics at the heart of globalization and the privileged position men's work holds. This engages strong and continuing resistance.¹³ As another UN report has stated, "economic systems which value profits often do so at the expense of female labour."¹⁴ Pay equity analysis must expose those who benefit and profit from the current inequitable distribution of globalization's economic dividends and this includes both powerful transnational corporations (TNCs) and also governments who rely on underpaid women's work to deliver poorly funded public services. Gender prejudices reinforced by religious beliefs are also powerful constraints. By increasing

11. Armstrong & Cornish, *supra* note 2; Cornish, Faraday & Verma, *supra* note 3; Cornish & Faraday, *Achieving Pay*, *supra* note 9.

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

13. Judy Fudge, *The Paradoxes of Pay Equity: Reflections on the Law and the Market in Bell Canada and the Public Service Alliance of Canada*, 12 CAN. J. WOMEN & L. 313 (2000).

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

economic choices and empowering women, pay equity changes the balance of power in women's homes, places of work, and communities. With the poor mostly women, pay equity is also now seen more broadly as part of the overall political struggle to address poverty and promote economic and social rights to ensure a "living wage."¹⁵ A sustainable pay equity mechanism must include a strategy for gaining political support supported by civil society, along with measures to fight back when the backlash occurs.

II. THE PROBLEM: GENDER BASED PAY DISCRIMINATION

A. *Occupational Segregation and Low Pay*

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

15. Katherine V.W. Stone, *Flexibilization, Globalization and Privatization: Three Challenges to Labour Rights in Our Time*, 44 OSGOODE HALL L.J. 77 (2006); Stephanie Luce, *The Full Fruits of Our Labour: The Rebirth of the Living Wage Movement*, 43 LAB. HIST. 401, 402-03 (2002).

16. CHICHA, *supra* note 4.

17. Armstrong & Cornish, *supra* note 2; ILO, GLOBAL EMPLOYMENT TRENDS: BRIEF (Geneva, Jan. 2006).

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

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

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

This systemic gender discrimination is widely acknowledged internationally in research literature and in public policy. Dating back to the 1970s and 1980s, scholars such as sociologist Pat Armstrong and others have detailed the evidence substantiating the gender basis for the discrimination faced by women in the pay they receive for their work.²² Armstrong has testified in many Canadian pay equity cases that have set international pay equity legal standards.²³ Her work establishes that discrimination in women's compensation arises out of three interconnected fundamental features associated with women's work: 1) Women are segregated from men into different work and often different places of work; 2) female-domination of work and low pay are linked and the more women are concentrated in a field of

19. PAT ARMSTRONG & HUGH ARMSTRONG, *THE DOUBLE GHETTO* (1984); Lynda Ames, *Fixing Women's Wages: The Effectiveness of Comparable Worth Policies (Canada)*, 48 *INDUS. & LAB. REL. REV.* 705 (1995).

20. *Id.*; UNIFEM, *supra* note 1; Cornish, Faraday & Verma, *supra* note 3, Cornish & Faraday, *Achieving Pay*, *supra* note 9.

21. ILO, *supra* note 6; UNIFEM, *supra* note 1; Armstrong & Cornish, *supra* note 2.

22. D. TREIMANN & H. I. HARTMANN, *WOMEN, WORK AND WAGES: EQUAL PAY FOR WORK OF EQUAL VALUE* (1981).

23. Armstrong, Cornish & Millar, *supra* note 6.

work, the less it pays. Overall, labor force data consistently shows that work mainly done by women is consistently paid less than the work mainly done by men, with little regard to the value of the work to the employer or the consumer; and 3) lower pay reflects the systemic undervaluation of women's work relative to that of men's work.²⁴ In the words of Armstrong:

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

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

24. ILO, *supra* note 6.

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

26. See Armstrong Report & Affidavit, *supra* note 25; CHCA, *supra* note 4.

27. Armstrong and Cornish, *supra* note 2; Cornish, Faraday & Verma, *supra* note 3; Fudge & Vosko, *supra* note 10.

B. Globalization, Labor Markets, and Women's Pay

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

With productive decentralization and "flexibilization" leading to the "individualization" of labor conditions and the elimination of "collective intermediaries like labor unions,"³⁴ the equality role of

28. H.W. Arthurs, *Labour Law Without The State*, 46 U.T.L.J. 1 (1995); Alain Supiot, *The Transformation of Work and the Future of Labour Law in Europe: A Multidisciplinary Perspective*, 138 INT'L LAB. L. REV. 33 (1999); Michel Piore & Sean Safford, *Changing Regimes of Workplace Governance, Shifting Axes of Social Mobilization and the Challenge to Industrial Relations Theory*, 45 INDUS. REL.: A J. ECON. & SOC'Y 299-325 (2006); Bob Hepple, *New Approaches to International Labor Regulation*, 26 INDUS. L.J. 353 (1994); Fudge, *supra* note 13. KERRY RITTICH, RECHARACTERIZING RESTRUCTURING: LAW, DISTRIBUTION AND GENDER IN MARKET REFORM (2002); Cornish, Faraday & Verma, *supra* note 3.

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

30. Cornish & Faraday, *Achieving Pay*, *supra* note 9.

31. Judy Fudge & Rosemary Owens, *Precarious Work, Women and the New Economy: The Challenge to Legal Norms*, in PRECARIOUS WORK, WOMEN AND THE NEW ECONOMY: THE CHALLENGE TO LEGAL NORMS 3 (Judy Fudge & Rosemary Owens eds., 2006); Fudge & Vosko, *supra* note 10.

32. Fudge, *supra* note 13; Armstrong & Cornish, *supra* note 2.

33. Cornish, Faraday & Verma, *supra* note 3.

34. Jelle Visser, *More Holes in the Bucket: Twenty Years of European Integration and Organized Labour*, 26 COMP. LAB. L. & POL'Y J. 477 (2005); ILO, ORGANIZING FOR SOCIAL JUSTICE 113, at <http://www.ilo.org/declaration>.

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

III. PAY EQUITY: THE HUMAN RIGHTS IMPERATIVE AND FRAMEWORK

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

A. *Pay Equity—The Development of a Fundamental Human Right*

The international equality seeking community, including the ILO, United Nations, trade unions, and NGOs have spent the last 100 years developing standards that represent the international and regional consensus on the pay equity obligations of state actors, institutions, and social partners. International instruments have imposed increasingly specific directives for action to be taken by signatory states in order to achieve pay equity for women. The ILO's 1952 Convention 100 was the first ILO standard that incorporated a systemic approach to redressing a labor market problem. This was followed by the 1958 ILO Convention 111 prohibiting discrimination in employment and more broadly in "occupation" that covers self-employment. These two Conventions shaped the development of

35. Armstrong & Cornish, *supra* note 2.

36. ILO, *supra* note 6.

future gender equality labor-related instruments. They also form part of the core labor standards enshrined in the ILO's 1996 *Declaration on Fundamental Principles and Rights at Work* that recognizes that achieving pay equity for women is interconnected with the securing of the other fundamental labor rights of freedom of association and the right to collective bargaining.³⁷

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

37. PAY EQUITY, *supra* note 6; Cornish & Armstrong, *supra* note 2.

38. See Armstrong, Cornish & Millar, *supra* note 6; Cornish, Faraday & Verma, *supra* note 3; United Nations, *supra* note 18.

39. Cornish, Faraday & Millar, *supra* note 6; Armstrong, Cornish & Millar, *supra* note 6.

40. See Dir 75/117/EEC on equal treatment between men and women on the application of the principle of equal pay. Now 3 of Article 141 EEC. Also see Dir 76/207/EEC on equal treatment of men and women for access to employment vocational training, promotion and working conditions. Dir 79/7/EEC concerning the prohibition of discrimination in statutory social security schemes; Mary Cornish, *Employment and Pay Equity in Canada—Success Brings Both Attacks and New Initiatives*, 22 CAN.-U.S. L.J. 265 (1996); Cornish & Faraday, *Achieving Pay*, *supra* note 9.

dismantle or weaken state institutions that would carry out those obligations.⁴¹

B. What are the International Pay Equity Standards?

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

41. Armstrong & Cornish, *supra* note 2; Cornish, Faraday & Verma, *supra* note 3.

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

C. *Impact of International Standards on Labor Market Governance of Pay Equity*

It is clear from these standards that governments are *required* to establish labor market governance mechanisms to operationalize the right to pay equity and therefore the voluntary measures that have been called for by some scholars are not consistent with such human rights obligations.⁴³ The only discretion left to governments, enterprises, trade unions, or other institutions is choosing the best way to identify and dismantle the long-standing patterns of systemic compensation discrimination. Effective and sustainable pay equity mechanisms that increase the pay received by undervalued "women's work" in relation to "men's work" are not optional. With the "human rights" element as the defining perspective of any implementation mechanism, any increases to the pay for "women's work" is then a "human rights remedy" providing redress for the fact that gender-based stereotypes have previously artificially reduced the pay women should have received for that work. It is not merely a "pay increase" that can be cutback or eliminated when it suits the cost-cutting agenda of a government or enterprise.⁴⁴

It is for this reason as well that a discourse that concentrates on the issue as one of "low pay," while helpful for building alliances and addressing poverty, is not sufficient since it fails to expose the discrimination women are subjected to and does not harness the "right" women have to pay redress. Further, without an overriding legal right to pay equity being enshrined in national laws, it is subsequently very difficult for women to legally challenge the failure to be paid equitable wages as well as cutbacks to those wages that may occur. The more successful women are in gaining access to pay equity, the stronger the backlash from both governments and enterprises and the greater the need for vulnerable women to have a strong state with effective laws to protect them.⁴⁵ The human rights focus also highlights the empowering component of pay equity where the process of making visible and acknowledging the importance of women's work is valuable in and of itself as a means of transforming

43. Paul C. Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth*, 99 HARV. L. REV. 1728 (1986); PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* (1990); IYER, *supra* note 5.

44. Cornish & Armstrong, *supra* note 2; Cornish & Faraday, *Achieving Pay*, *supra* note 9; Patricia Hughes, *SEIU, Chambers and Valian v. Ontario: A Model for Future Challenges to Government Action?*, 6 CAN. LAB. EMP. L. J. 78 (1998); Patricia Hughes, *Newfoundland (Treasury Board) v. N.A.P.E. Women as Sacrificial Lambs*, 11 CAN. LAB. EMP. L. J. 384 (2005).

45. Cornish & Armstrong, *supra* note 2; Cornish, *supra* note 9.

the discourse and enabling women and men to reach a new respect for the worth of what women do.⁴⁶ ILO Conventions 100 and 111 read together can be interpreted to require the elimination of pay discrimination from a broad range of women's work, including those in the informal economy and in self-employment. When combined with the international pay equity standards referred to earlier, it is clear that the difficulty lies not in the breadth of the international rules but in fashioning the pay equity mechanisms that will deliver the promise of those standards.

IV. PAY EQUITY: THE BUSINESS AND DEVELOPMENT IMPERATIVE

While the human rights imperative for securing pay equity should be enough, experience has shown a business and development case must also be made and this is not hard to do. Poverty reduction, sustainable economic growth, and pay equity are all inextricably interlinked. The World Bank in its 2006 World Development Report highlights the ongoing global gender pay gap as part of the profound and increasing economic inequalities that are impoverishing not only women but children, families, and communities. Finding that markets in developing and developed countries are often exacerbating rather than correcting the problem, the Bank calls for pro-active, concrete equity planning to remedy the "inequality traps" that will otherwise "tend to reproduce themselves over time and across generations."⁴⁷ Similarly, the World Bank's 2006 Gender Action Plan also calls on countries to harness the economic growth potential of the planet's women by rectifying the systemic labor market inequalities women face.⁴⁸ Given that a poor woman's main asset is her labor and that asset is subject to a worldwide penalty because of the gender of the asset holder, poverty reduction efforts will not make any significant headway until the global gender pay gap is addressed.⁴⁹ Social protection strategies increasingly focus on incorporating implementation of the ILO's core labor standards that includes

46. *Id.*; Hallock, *supra* 5.

47. *Id.*; WORLD BANK, GLOBAL MONITORING REPORT, MILLENNIUM DEVELOPMENT GOALS: STRENGTHENING MUTUAL ACCOUNTABILITY, AID, TRADE AND GOVERNANCE (2006).

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

49. See ILO, *supra* note 6; ILO, *supra* note 12; Cornish, *supra* note 9.

Conventions 100 and 111.⁵⁰ With businesses needing an efficient labor market, discriminatory barriers to the full productive use of half the world's labor supply is a massive inefficiency that needs to be rectified.⁵¹

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

V. MAINSTREAMING PAY EQUITY INTO LABOR MARKET GOVERNANCE

A. *New Models of Governance for Globalized Work*

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

50. See GORDON BETCHERMAN, AMY LUISTRA & MAKOTO OGAWA, *LABOR MARKET REGULATION: INTERNATIONAL EXPERIENCE IN PROMOTING EMPLOYMENT AND SOCIAL PROTECTION* (2002); ILO, *supra* note 6.

51. WORLD BANK, *INTEGRATING GENDER IN THE WORLD BANK'S WORK—A STRATEGY FOR ACTION* (2002).

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

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

concentrated on protecting the male-dominated model of “standard” employment, that is, full time permanent employment.⁵⁴ While labor laws developed in the mid-to-late twentieth century started to recognize the need to extend protections to the precarious and discriminatory conditions of women’s work, neo-liberal global forces at the same time championed the value of individualism and the free market, reduced state intervention, weakened collective bargaining rights, and shifted work to lower paid workers.⁵⁵ Under the neo-liberal model, employment rights are often tied either formally or in practice to the male-dominated more secure job.⁵⁶ Standing in contrast to the neo-liberal governance model, the social citizenship model ties employment rights to broader notions of work and society where empowerment, voice, and equity are enshrined.⁵⁷

B. Making Women’s Work Visible

1. Recovering Women’s Work

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

Saskia Sassen has highlighted the importance of recovering the role and value of women’s work in economic processes at the local, national, and global level through “mapping” such work. Once mapped, the necessary remedial action can be taken to ensure

54. Fudge, *supra* note 13; Armstrong & Cornish *supra* note 2.

55. Armstrong & Cornish, *supra* note 2.

56. Piore & Safford, *supra* note 28.

57. Supiot, *supra* note 28; Piore & Safford, *supra* note 28.

58. See discussion in Rubery, Grimshaw & Figueiredo, *supra* note 5.

59. Cornish, Faraday & Verma, *supra* note 3.

60. Leah Vosko, *Precarious Employment: Towards an Improved Understanding of Labour Market Insecurity*, in PRECARIOUS EMPLOYMENT: UNDERSTANDING LABOUR MARKET INSECURITY IN CANADA 3 (2005).

equitable treatment of the “recovered” work. Sassen’s scholarship provides a useful example of the kind of analysis that is needed in order to understand where and under what conditions women work; the growing importance of such work to the global economy; and the absence of commensurate recognition and pay.⁶¹ Sassen outlines the stages of feminist literature that have documented this “recovery” starting with the role of women’s “subsistence” work in financing the modernization of economies; the “feminization of the proletariat” with the internationalization of manufacturing production; the new global circuit of migrant workers; and the new urban “female proletariat” supporting the servicing, financing, and management of global economic process assisted by the new “serving classes” of women and immigrants performing housework tasks. For all these women, the varying systems for determining the pay for women’s work must be exposed and steps taken to provide a way to deliver equitable pay to that work.

2. Engendering Labour Governance Concepts

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

The first step is to enshrine in the new governance model a recognition that the work “standard” to women includes many different types of worker and self-employment relationships and therefore the equality promoting mechanisms must vary accordingly to be effective.⁶⁴ As noted by feminist labor law theorists, the new paradigm of labor law is now comprised of many different equality

61. Saskia Sassen, *Women’s Burden: Countergeographies of Globalization: the Feminization of Survival*, 53 J. INT’L AFF. 503 (2000).

62. OTTO KAHN-FREUND, *LABOUR & THE LAW* 7 (24th Series, 1972).

63. ARMSTRONG & ARMSTRONG, *supra* 19; Fudge & Vosko, *supra* note 10.

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

mechanisms involving both state and non-state actors and moving beyond the traditional parameters of labor law as contracts, collective bargaining, and statutory regulation.⁶⁵ Regulating mechanisms now involving a range of normative and binding rules including trading rules. As a result, there is a need to reconsider the interconnecting roles of the state and social partners and the appropriate balance of “hard” and “soft” law including the appropriateness of “decentered” regulation, such as corporate codes of conduct. This has led to a recent phenomenon where non-state actors other than employers and trade unions, namely NGOs, women’s organizations, and consumers have started to develop equality roles within the labor governance system.⁶⁶

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

The first concept to reconsider is that of the “workplace.” With its connotation of a single location and single employer, it fails to capture the array of conditions of women’s work such as the export processing zone factory, street vendor operations, crafts cooperatives, the sex trade, or migrant domestic workers.⁶⁸ The concept of women workers as “employees” must also be re-examined. Now women’s precarious employment is increasingly leading them to self-

65. See Adelle Blackett, *Global Governance, Legal Pluralism and the Decentred State: A Labor Law Critique of Codes of Corporate Conduct*, 8 IND.J. GLOBAL LEG. STUD. 401 (2001); Adelle Blackett & Colleen Sheppard, *Collective Bargaining and Equality: Making the Connections*, 142 INT’L LAB. REV. 419 (2003); Colleen Sheppard, *Rethinking the Boundaries of Workplace Discrimination in Canada*, (presentation to Workplace Discrimination Seminar, Washington, D.C. Nov. 18–19, 2004); Fudge, *supra* note 13; RITTICH, *supra* note 28.

66. Armstrong & Cornish, *supra* note 2; Blackett, *id.*; Genoveva Tisheva, *Creating an Enabling Environment for Women’s Participation in Development through Legal and Regulatory Frameworks that Provide Women’s Equal Access to Rights and Opportunities in the Field of Education, Work and Health—Challenges and Recommendations and the Role of Women’s NGOs* (prepared by Genoveva Tisheva, Oct. 30, 2005, UNDAW Expert Group Meeting, “Enhancing Participation of Women in Development Through An Enabling Environment for Achieving Gender Equality and The Advancement of Women,” Bangkok Thailand, Nov. 8–11, 2005), available at <http://www.un.org/womenwatch/daw/egm/enabling-environment2005/docs/EGM-WPD-EE-2005-EP.5%20%20G.pdf>.

67. Fudge, *supra* note 13; Armstrong & Cornish, *supra* note 2.

68. UNIFEM, *supra* note 1.

employment, some in global production chains and others in craft or small business enterprises.⁶⁹ Engendering the meaning of “employer” requires examination of the many ways that business enterprises seek to avoid responsibility for the “employment” and affording of labor rights to women through outsourcing, networked enterprises, and disguised employment.

VI. LESSONS LEARNED FROM PAY EQUITY GOVERNANCE TO DATE

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

Why is there so little compliance? First, while most countries have ratified ILO Convention 100, only a much smaller number have actually passed implementing laws. In North America, Canada's federal jurisdiction and a number of other Canadian provinces a small number of jurisdictions have passed such laws, with Ontario and Quebec having pro-active laws covering the public and private sectors. Where pro-active pay equity laws have been passed, some women,

69. Sassen, *supra* note 61.

70. CHICHA, *supra* note 4.

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

particularly those in the public sector having union representation have obtained very significant pay equity adjustments. In Ontario, 100,000 of the lowest paid public sector women working in predominantly female workplaces such as child care centers and nursing homes have received hundreds of millions of dollars in pay equity adjustments payable on an ongoing annual basis as a result of two separate court cases to enforce their rights under Ontario's Pay Equity Act.⁷² In Quebec, a 2006 pay equity settlement with the Quebec Government ten years after its Pay Equity Act was passed entitles some 327,000 women in the public sector to substantial pay equity adjustments and \$1.5 billion in back pay with the total settlement valued at an estimated \$4 billion. Both cases were brought by public sector unions but the results also covered non-unionized women working in other public sector workplaces. Even under the federal complaint-based equal value law, women workers have received major settlements, although again after costly and lengthy legal battles. Bell Canada's 4765 telephone operators received a \$104 million pay equity settlement in 2006 that included pay equity settlement monies, payment for pain and suffering and adjustment to pensionable earnings.⁷³ The Canadian federal government also paid out approximately \$3 billion in pay equity adjustment to women in predominantly female jobs in the government. As well, there are many pay equity initiatives worldwide, particularly in the public sector where women are challenging their employers to provide an equitable wage structure through pay equity comparisons.⁷⁴ The process of achieving a new valuation for women's work has been an empowering one for women who are able to participate in a process where the value of their work is being recognized.

At the same time as there have been many successes in Quebec and Ontario based on the mandatory pay equity laws in place, there has also been substantial non-compliance. In a recent speech at an Ontario Federation of Labour conference, Ontario's Chief Pay Equity Commissioner stated that there was major non-compliance in the

72. Cornish & Faraday, *Achieving Pay*, *supra* note 9.

73. Information Release, Communications Energy and Paperworkers Union of Canada, CEP Reaches \$104 Million Pay Equity Settlement at Bell (2006), available at http://www.cep.ca/human_rights/equity/bell/equityrelease_e.pdf.

74. For more information, see Public Service Alliance of Canada's Web site, <http://www.psac.com/what/payequity/pay-e.cfm#http://www.psac.com/what/payequity/pay-e.cfm#>; Pay Equity case studies prepared by Public Services International detailing pay equity initiatives in many countries as well as the PSI bi-monthly newsletter, Pay Equity Now, http://www.world-psi.org/TemplateEn.cfm?Section=Pay_Equity_Campaign&CONTENTID=8999&TEMPLATE=/ContentManagement/ContentDisplay.cfm.

private sector after nearly twenty years of Ontario's law being in place.⁷⁵ This non-compliance is particularly acute in non-unionized sectors.

As with all legislation that intervenes in the employment relationship, pay equity legislation is a result of a state-mediated compromise that attempts to reduce the power of employers over gender relations in the workplace. The main limitations of pay equity legislation have been identified by many commentators including: that pay equity is too limited in scope and applicability within the changing labor market; some schemes are solely complaint driven; the definition of female job classifications was too narrow; the technical requirements in assessing job comparisons too onerous especially on workers; the implicit gender-bias and hierarchy in the comparison tools; that employers could unilaterally change job descriptions; the long implementation time of wage adjustments in the private sector; compliance was erratic in smaller workplaces, sanctions against employers were not severe enough; and the lack of enforcement especially in non-unionized or less unionized sectors and with the privatization of public services, eroded pay equity gains.⁷⁶

The ILO has recently studied the various key models used in six jurisdictions: Sweden, Quebec (Canada), the United Kingdom, the Netherlands, France, and Switzerland. The report shows that there are a number of different design models for pay equity. The first model studied was Sweden and Quebec (Canada) that is based upon legislation that identifies wage discrimination through a comparison between female-dominated and male-dominated jobs for the same employer or the same establishment, an evaluation of these jobs using a non-discriminatory method of analytical job evaluation, and an estimate of the pay gap between these jobs. This model, which was used in Ontario (Canada) requires companies to adopt an action plan that if discriminatory pay gaps exist it must be rectified through pay increases within established time frames. It seeks to remove the underpinnings of the discriminatory aspects of pay with the final objective to institute equal pay. The second model, described as the equal opportunities model in the United Kingdom and the Netherlands focuses more on equal opportunities rather than results. While it proves a rich guidance for job evaluation, it does not require

75. Speech of Emmanuela Heyninck, Ontario Pay Equity Commissioner, Ontario Federation of Labour, Pay Equity Maintenance: Union Obligations and Liabilities (Nov. 14, 2006).

76. Armstrong & Cornish, *supra* note 2; JUST WAGES, *supra* note 5; Hallock, *supra* note 5; IYER, *supra* note 5.

a structured sequence for achieving pay equity, nor that pay equity must be achieved in a specific time frame. As a complaint-based model, it tends to rely more on the employer's "voluntarism" and there is a low level of employer compliance. The third model, used in France and Switzerland, is based upon gender pay gap indicators relying upon the productivity characteristics of female workers with limited measures that target the discriminatory pay gap. Again, compliance with this model is very low. Compliance in fact declines as you move from models one to two and three.⁷⁷

Not surprisingly, the report concludes that model one is the most effective because of the following features: the time-specific detailed requirements for the steps to achieve pay equity results; the requirement for a job evaluation methodology that focuses on "how to estimate the pay gap between jobs of equal value and how to calculate the pay adjustments to be made"; the requirement to enact "compulsory, proactive legislation"; and the provision of technical support by specialized bodies dedicated to pay equity. There are a number of key challenges facing the struggle to close the global gender pay gap: 1) declining unionization rates and protection of the right of workers to organize collectively; 2) flexibilization of employment relationships with the rise of precarious work arrangements and self-employment, which although not new to women, have expanded; 3) expansion of the informal economy; 4) work reorganization—proliferation of new forms of horizontal corporate organization internationally (contracting out and subcontracting), privatization in public sector; and 5) lack of state intervention such as legislative weaknesses and limitations, lack of enforcement and the reliance on soft law corporate codes of conduct without effective monitoring and enforcement mechanisms.

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

While international instruments clearly require signatory countries to establish effective laws and institutions to allow women to redress labor market violations, most countries do not have effective laws. The laws that are in place are often inaccessible to women who

77. CHICHA, *supra* note 4.

lack the resources to access the legal system. Most enforcement systems are complaints-based and thus rely on individual workers, their representatives, or administrative officials to trigger their operation. Given the systemic nature of labor market gender discrimination and the limited available resources, a complaint-based approach is generally ineffective and too slow to achieve significant equality results. A recent Canadian Task Force report called for a pro-active law in the federal sector although this proposal has now been rejected.⁷⁸ It is for this reason that international instruments require states, employers, and unions to take a proactive approach to redressing gender equality by identifying the systemic problems and developing systemic solutions. Given the strong “political” dynamics of the labor market and the necessity to ensure the rule of law, mechanisms must be developed to enforce these solutions.⁷⁹

VII. CLOSING THE GAP: DESIGNING PAY EQUITY PROMOTING MECHANISMS

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

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

B. *Planning for Pay Equity*

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

Systemic gender discrimination requires gender-sensitive systemic planning and remedies.⁸¹ Pay equity plans must be developed at all levels of the labor market, starting with trading

78. See PAY EQUITY, *supra* note 6.

79. *Id.*

80. Armstrong & Cornish, *supra* note 2.

81. *Id.*

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

2. Mapping the Problem

Pay equity mechanisms need to be grounded in a concrete, data-based analysis of the nature and conditions of women's work and the specific economic, political, and social constraints and prejudices that women face in obtaining equitable pay for their work. This fact-based analytical process carried out in consultation with women's voice organizations allows the state and other equity actors to properly design the necessary justice mechanisms. This mapping should include: assessing the extent of gender-based prejudice and stereotypes, the state of the economic conditions and impact of globalization, the degree of sovereignty of the state and its ability and capacity to regulate and allocate resources, the state of social reproduction and social relations including the burdens women face of reconciling work and family life, and the existence or non-existence of mechanisms or institutions to promote the equality, capacity, and extent of civil society. This analysis should make visible the various

82. Cornish & Faraday, *Achieving Pay*, *supra* note 9.

types of work that women do and the pay conditions under which such work is performed. This can then lead to the design of specific labor market levers that will deliver greater pay to women for the work they do. This approach requires resourcing and capacity building to produce the necessary sex-disaggregated data and to train those participating in the analysis of pay equity considerations.⁸³

C. *Understanding and Addressing Gender Differences*

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

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

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

83. Cornish, *supra* note 9.

84. See the recent ILO study, Kanchana N. Ruwanpura, *The Quality of Women's Employment: A Focus on the South*, which reflects on the considerations and measures that must be taken to address social and institutional labor market restraints in designing labor market gender equality protections. Kanchana N. Ruwanpura, *The Quality of Women's Employment: A Focus on the South*, (Decent Work Research Programme, International Institute for Labour Studies, 2004), available at <http://www.ilo.org/public/english/bureau/institute/research/crbien.htm>.

85. Armstrong & Cornish, *supra* note 2; Cornish, Faraday & Verma, *supra* note 3.

in economic decisionmaking.⁸⁶ The World Bank has recently underlined this role stating that “the collective organization of workers is one of the main channels for securing better and more equitable working conditions.”⁸⁷ Trade unions provide this collective voice and many work hard to promote equality measures. The global union, Public Services International (PSI), has been carrying out a worldwide campaign entitled “Pay Equity Now” that operates in both developed and developing countries providing resources and training materials.⁸⁸ The Bank has noted the role of trade unions in reducing inequality and wage discrimination in countries as diverse as Ghana, the Republic of Korea, Mexico, and Spain.⁸⁹

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

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

86. Cornish & Faraday, *supra* note 9.

87. WORLD BANK, WORLD DEVELOPMENT REPORT 2006: EQUITY AND DEVELOPMENT (Washington, 2006).

88. For copies of the bi-monthly newsletter and the Pay Equity Resource Package, see the Public Services International Web site, <http://www.world-psi.org/payequity>.

89. WORLD BANK, *supra* note 87.

90. Cornish, Faraday & Verma, *supra* note 3; Cornish & Faraday, *Achieving Pay*, *supra* note 9.

91. Cornish, Faraday & Verma, *supra* note 3; ILO, *supra* note 6; Cornish, *supra* note 9.

E. Designing Pay Equity Laws

Drawing upon the work of Armstrong and other scholars and experiences to date, the following lessons have been learned and will help to guide the future development of pay equity mechanisms and strategies.⁹² First, as a fundamental human right, the state and others with equality responsibilities have a mandatory obligation to ensure that women can obtain the right. The only discretion that should be exercised is on timing and method of implementation. Second, achieving and maintaining pay equity for the diversity of women's work is a complex problem as the drivers forging women's unequal pay are multi-faceted and inter-connected. Therefore, designing mechanisms to close the pay gap requires first a "diagnosis" of the national, local and enterprise or business context and circumstances; Third, pay equity requires steps to be taken to make visible and to value women's work and to confront the patriarchal constraints and prejudices that has privileged male work and undervalued women's work. Fourth, inequities are a systemic problem and require proactive, systemic planned solutions aimed at transforming the identified discriminatory circumstances that are causing the pay gap. Fifth, there is no single solution and a variety of different mechanisms are required to address the diversity of women's waged work in the formal and informal economy, women's self employment and the problem of work that is not paid at all. Sixth, women's voice through their own organizations or trade unions must be at the center of the design of pay equity mechanisms as women themselves best understand the nature of their discrimination and the solutions. Seventh, both state and non-state actors and social partners must be engaged in the pursuit of pay equity; pay equity mechanisms must be participative and transparent. Eighth, pay equity compliance requires constant renewal and transformation to address constantly changing nature and conditions of male and female work and changing structure and conditions of employers and economy. Finally, enforcement mechanisms must be accessible and resourced.⁹³

92. Armstrong & Cornish, *supra* note 2.

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

F. Designing Pay Equity for Precarious Work

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

There is great potential for pay equity efforts in the informal sector where women are increasingly predominant. The informal economy comprises both wage employment in precarious jobs and self-employment in small enterprises. A significant number of small local associations of workers in the informal economy are now joining together in larger alliances in cities, countries, regions, and internationally in order to advance their economic and social interests: for example, Homenet South Asia, National Alliance of Street Vendors of India, and StreetNet International. Worker cooperatives are also increasing. Some organizations have worked with the trade union movement and become ICFTU affiliates. With leadership from SEWA, the long standing and largest organization of informal workers, there is now an International Coordinating Committee of informal worker organizations. WIEGO, the Women in Informal Employment, Globalizing and Organizing, a network of activists, researchers, and policy-makers, is also playing an important role in "recovering" the work of women in the informal economy and promoting efforts to improve the pay women receive for their informal work.⁹⁵

Another important tool in this area is the use of bargaining for sectoral and national wages. Centralized bargaining has traditionally tended to favor equality concerns. In the United Kingdom, Australia, and New Zealand, the decentralization of the industrial relations

94. Cornish, *supra* note 9; ILO, *supra* note 6; ILO, *supra* note 12.

95. For statistics and examples of initiatives, see Women in Informal Employment, Globalizing and Organizing, <http://www.wiego.org>; ILO, GENDER EQUALITY AND DECENT WORK: GOOD PRACTICES AT THE WORKPLACE (Bureau for Gender Equality, 2004).

framework has had a negative impact on bargaining for gender equality, particularly for equality in remuneration.⁹⁶ This bargaining is particularly helpful for those in precarious jobs, such as employment agency or household workers or to work together for access to credit where self-employed.⁹⁷

Minimum wage laws have been a tool of pay equity campaigns dating back to the 1970s when they formed a key part of Ontario's Equal Pay Coalition campaign.⁹⁸ More recently, Public Services International has made the living wage part of its pay equity campaign worldwide. For the poor who are predominantly women working in precarious employment relationships, pay equity is now seen more broadly as part of the overall struggle to promote economic and social rights.

With women's low pay, they are often working at the minimum wage and therefore increases to the minimum wage provide a fast way of increasing their wages without the need for women to complain and without the need to justify the increase based on a comparison with men's work. Higher minimum wages have been shown to reduce the dispersion of earnings and the incidence of low pay in developed countries.⁹⁹ While studies have shown that minimum wage laws may be less effective in developing countries as a result of limited coverage and lack of enforcement, recent research has shown that minimum wages do have an impact in the informal sectors.¹⁰⁰ Increases in minimum wages in developing countries have improved women's pay where the equalization of minimum rates occurred between men and women in sector-level collective agreements and where it established comparable wages across dissimilar and often sex-segregated workplaces—if the new minimum wage was set above the current female-dominated sectors.¹⁰¹

96. ILO, *supra* note 6.

97. Cornish, Faraday & Verma, *supra* note 3; Cornish & Faraday, *Achieving Pay*, *supra* note 9; ILO *supra* note 6.

98. Armstrong & Cornish, *supra* note 2.

99. *Id.*; BETCHERMAN, LUISTRA & OGAWA, *supra* note 50.

100. Nora Claudia Lustig & Darryl McLeod, *Minimum Wages and Poverty in Developing Countries: Some Empirical Evidence*, in BROOKINGS INSTITUTION, *LABOR MARKETS IN LATIN AMERICA: COMBINING SOCIAL PROTECTION WITH MARKET FLEXIBILITY* 62 (Sebastian Edwards & Nora Claudia Lustig eds., 1997); Armstrong & Cornish, *supra* note 2; Cornish, Faraday & Verma, *supra* note 3.

101. Janine Rodgers & Jill Rubery, *Perspective: The Minimum Wage as a Tool to Combat Discrimination and Promote Equality*, 142 INT'L LAB. REV. 547 (2003).

G. Designing Pay Equity Mechanisms for Self Employed Women

For women who are self-employed as own account workers, contributing family workers, or workers in cooperatives, pay equity mechanisms are needed that address the gender-based prejudices that infuse the pay they receive for their own labor, products, or services. As just one example, this could include measures such as providing micro-financing assistance, marketing and export training and assistance, and other entrepreneurial supports that are comparable to that provided to micro-enterprises dominated by men.¹⁰² Successful strategies in this area would focus on closing the business income gap between men's and women's micro businesses. The World Bank Gender Action Plan includes support for affirmative action measures to support female micro-enterprise entrepreneurs in gaining access to greater incomes. As well, efforts include measures to provide women entrepreneurs with forms of social protection that employees might have.

As noted above, collective organizations are playing a key role in organizing women who are self-employed and the ILO has provided some assistance with funding, marketing, and training initiatives. This was seen in the organizing of the market traders in Cote D'Ivoire and Burkina Faso. The ILO support was critical to establishing the institutional support and capacity building needed to give voice to the market traders.¹⁰³ Cooperatives are another way of helping women to redress their unequal access to other economic resources, including land and capital that form the basis for access to credit.

H. Corporate Social Responsibility

Corporate and institutional codes of conduct have become an important new tool in the struggle to secure protections for women's precarious work, particularly in the global production chains. Fueled by consumer campaigns, campaigns aimed at the consumers of businesses such as the Gap, Nike, and Tommy Hilfiger have persuaded companies that it is in their best business interest to improve the conditions of the contractor's workers.¹⁰⁴ Concerns have been raised about CSR being private law and its effectiveness for pay equity purposes. A recent ILO analysis of the use of CSR as a pay equity strategy notes that most CSR mechanisms do not refer in any

102. Fudge & Vosko, *supra* note 10.

103. Cornish, Faraday & Verma, *supra* note 3.

104. *Id.*

explicit way to the need to secure pay equity.¹⁰⁵ However, some do refer to the ILO core labor standards that include Conventions 100 and 111. The Calvert Women's Principles do explicitly include these principles and apply them to women's waged work and entrepreneurial activities.¹⁰⁶ Despite its limitation, CSR remains an important potential means to address this issue not as a substitute for "hard" law but rather as a complementary strategy for implementing an employer's obligations.

VIII. CONCLUSIONS: LOOKING TO THE FUTURE

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

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

105. CHICHA, *supra* note 4.

106. Calvert Women's Principles, Establish Pay Equity Policies That Pay Comparable Wages and Benefits, Including Retirement Security Benefits, To Men and Women for Comparable Work, *available at* <http://www.calvert.com/womensPrinciples.html>; Calvert Women's Principles, Encourage and Support Women's Entrepreneurship, and Seek to Enter into Contractual and Other Business Relationships with Women-owned Businesses and Vendors, Including Micro-enterprises, and Work with Them to Arrange Fair Credit and Lending Terms, *available at* <http://www.calvert.com/womensPrinciples.html>.

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