

A Note on Constitutional Principle: Same Work, Same Wage?

Virak Prum¹

Abstract

This short article seeks to highlight the same work same wage principle enshrined in the Cambodian Constitution. It begins with a brief introduction on the meaning of the Constitution itself, followed by several approaches often used in statutory interpretation. Since an agreed definition of what constitutes same work still seems lacking in Cambodian system, the article relies on a comparative view to shed light on some directions this constitutional principle might take in the future.

Key terms: Same work; Interpretation; Discrimination.

Meaning of the Constitution

There are many laws in a country. These are made by elected representatives of the people and, as such, laws derive their legitimacy from the people themselves, which is the foundation of a democratic system. Nobody is above the law, nor can anyone discard it at will. Since enacted laws must be obeyed, in order to ensure that laws won't be so abusive, so arbitrary so as to harm the people, theorists have long devised a doctrine by which laws themselves must respect a set of established principles that ought to have a supreme authority to which laws must conform. In order to preserve their value, in the modern times, those principles are often embodied in a document that represents a "social compact" or "social contract" which the people are thought to have consensually made among themselves.²

Like any other contracts, the Constitution defines terms and conditions governing the relationship between two parties: the people and the government. On the one hand, the Constitution guarantees certain human rights and freedoms that are unalienable. On the other hand, it mandates that government, whose existence is to protect those rights and freedoms, can only have a limited power.³ In the French legal tradition, the current Constitution was written by those elected representatives who for once were given the original constitutional power ("pouvoir constituant originaire") to determine the scope of the relationship. Once written and adopted, the Constitution became the highest law. Parliament may not amend it as it pleases since representatives will now have only the derived constitutional power ("pouvoir constituant dérivé") which does not empower them to change the terms of the Constitution unless through a very

¹ Dr. Virak Prum, LLB, LLM, PhD, teaches Cambodian Business Law classes at CamEd Business School.

² The concept of the social contract had been partly expounded by John Locke before being made famous by Jean Jacques Rousseau. John Locke, *Two Treatises of Government* (1690). Jean Jacques Rousseau, *Du Contrat Social* (1762).

³ See Erwin Chemerinsky (2011) *Constitutional Law: Principles and Policies*. New York: Wolters Kluwer.

special procedure which normally requires a high majority vote.⁴ The fact that the Constitution is made very hard to amend arguably provides an assurance to the people that their unalienable rights and freedoms are well secured. Laws made by parliament must therefore conform to the Constitution at all times in order to never violate those rights and freedoms.

Interpreting the Constitution and Laws

There are several approaches in interpreting the Constitution. The easiest one takes the meaning as it bluntly is. Thus, when the Constitution stipulates that the eligible age for voting is 18 and above, nobody aged less than 18 may vote. This is called Plain Meaning approach. When there exist reasonable doubts as to the real meaning of a provision or term, interpreters shall study, evaluate, compare, combine and finally choose the tool they think is most suitable for a particular matter. In theory, rules used in statutory interpretation may be used in interpreting all sorts of norms, constitutional and legal norms. This is because when one interprets a law to check its constitutionality, the exercise ultimately involves giving effect to meanings of concerned constitutional provisions. The common approaches in statutory interpretation include:⁵

- Legislative history: interpreters must study the comprehensive history covering the entire period of legal drafting for a particular provision that needs interpreting. Thus, in the Cambodian context, careful interpreters shall thoroughly review the government's policy related to the matter as well as all the drafts used in every stage from the initial first draft by the author ministry until the final version adopted by parliament. Essentially, they must study all of these drafts: ministry's first draft, the subsequent drafts used at the inter-ministerial meetings, the draft put forward to the Cabinet full meeting, the draft sent to parliament, the draft debated/amended by parliament, and the adopted version of the law. Records of all such meetings play a very important role as they provide vivid discussions. In doing this thorough research, interpreters strive to reveal the real intention of the lawmaker.
- Purpose of the law: If the legislative history fails to yield a satisfactory answer, the concerned provisions may be interpreted on the basis of the overall purpose of the law itself. This is why every draft law in Cambodia that gets sent to parliament must now be accompanied by a so-called Statement of Reasons which explains the reason(s) for having such law. It has now become an established practice that most laws would have their purpose or objectives stated in the first chapter.
- In light of prior interpretations. Typically in a common law country, judges shall give effect to the meanings which have been founded in similar previous cases decided upon by judges of higher courts. In Cambodian labor disputes resolution, the arbitrators have consistently applied this common law tradition by abiding with prior interpretations of their peers. Thus, it is very common to see in arbitral awards a phrase such as this one: "The arbitrators in the present case also agree with the interpretations given by previous arbitrators concerning..."
- In light of related provisions. This is also called contextual interpretation whereby the meaning of a controversial provision may be determined by referring to other provisions

⁴ See Francis Hamon, Michel Troper, Georges Burdeau (2001) *Droit Constitutionnel*. Paris: L.G.D.J.

⁵ For detailed discussions on other approaches, See Jane Ginsburg, 2nd ed (2003) *Legal Methods. Cases and Materials*. New York: Foundation Press.

of the same law or related laws. This is the position taken by the Arbitration Council in its arbitral awards 03/03 and 10/03.⁶

Sam Work Same Wage Principle

The current Constitution of 1993 stipulates in its Article 36 that “Cambodian citizens of both sexes have the right to receive the same wage for the same work.” This provision guarantees equality for men and women when it comes to remuneration for work. Any discrimination in wage based on sex is, therefore, clearly prohibited. Indeed, this prohibition is confirmed in the subsequent Labor Law of 1997 which in its Article 12 has extended non-discrimination to cover other grounds too, namely, race, color, creed, religion, political opinion, birth, social origin and membership in a labor union or exercise of union activity. However, while employees have routinely brought allegations of discrimination due to union membership or union activity, the same-work-same-wage principle does not seem to have become a popular issue before the Arbitration Council yet.⁷

From the legislative history side, suffice it to say that the 1997 Labor Law was largely drafted by foreign legal experts who were eager to bring their labor standards to Cambodia. When the draft was debated at the National Assembly, there was no concrete discussion by Cambodian parliamentarians on what would constitute same work. What became the 1997 Labor Law was essentially a combination of various translations into the Khmer language. This sad point is well known among labor law teachers. Indeed, the Arbitration Council itself has even suggested that the original draft in the French language be relied upon should any provisions in the actual law in Khmer sound ambiguous.⁸ From the purpose of the law side, the 1997 Law does not clearly state any purpose. The practice of stating a purpose in the text of law is a recent phenomenon. On the positive note, the Arbitration Council has endorsed the interpretations by prior decisions and by referencing to the context, although the Council appears to not yet have ruled on the meaning of same work same wage principle.

In the absence of a readily clear guidance both in law and in jurisprudence and given the fact that the drafting of the 1997 Law was greatly assisted by French experts, the following section on comparative view will have to heavily draw on the French labor law.

Comparative View: The French System

What constitutes the same work? The official publication from the French Ministry of Employment, Social Cohesion and Housing defines it as “a work which requires from employees a set of comparable professional knowledge or capabilities.”⁹ As this publication puts it, while knowledge could be validated by the title, the degree or practice in the industry, capabilities can come from experience, responsibilities, or physical or mental requirements demanded by the position. In determining whether two works are same work, one must take all of those criteria into considerations. Thus, if we follow the French logic, there would be same work when those positions require:

⁶ See The Arbitration Council Digest. #1 of 2003, dated 10 August 2003, p.4. Available at http://www.arbitrationcouncil.org/kh/ac_decisions/decisions-digest (accessed on 05 April 2016)

⁷ I make this tentative assertion solely based on my review of some recent cases heard by the Council from 11 March 2016 to 01 April 2016.

⁸ See The Arbitration Council Digest. *op.cit.*

⁹ See Ministère de l'Emploi, de la Coésion sociale et du Logement, 8e ed (2006) *Guide Pratique du Droit du Travail*. Paris: La Documentation Française.

- Same or similar title
- Same or similar academic requirements
- Same or similar requirements as the industry usually dictates
- Same or similar level of experience
- Same or similar responsibilities or duties
- Same or similar physical or mental specifications

While the same title and academic requirements seem easy to prove, all the remaining four criteria should offer a great deal of flexibilities. By this, I mean a great deal of difficulties. For instance, should a two-year experience with a family owned business be counted as the same two-year experience with a publicly listed corporation although the job duties are similar? Should a position which requires heavy lifting of two hours a day be the same as a position requiring lighter lifting of four hours a day? These are legitimate questions and aren't easy to answer as they are more of questions of facts rather than questions of law. Consequently, it would be unwise to prescribe any one-size-fits-all formula although a good starting point would be to ensure that the majority of the abovementioned criteria shall be met.

Concluding remarks

Granted, the current labor law (Art.12) does not consider as discrimination all such distinctions, rejections or acceptances which are based on qualifications required for a specific job.¹⁰ But these exceptions do not mention pay, meaning that pay discrimination based on sex cannot be permitted. If found guilty of having practiced pay-related discrimination based on sex, the guilty party will be liable to a fine of sixty-one to ninety days of base daily wage or to imprisonment of six days to one month.¹¹

When presented with a same-work-same-wage matter in the future, the adjudicators would do well, firstly, to resolve the matter on a case-by-case basis by taking the abovementioned six criteria into account or relying on other comparable elements.¹² Secondly, as always, there is a need for consistency in their rulings with an aim to establishing a predictable jurisprudence. Want it or not, when the law is lacking, the Arbitration Council has the power to issue rulings based on equity. However, for any new body of case law to develop, the Council needs relevant cases. Thirdly, therefore, disputes concerning same-work-same-wage matter should not be discouraged because not only they help clarify ambiguous points of law, they also provide opportunities to glorify the grand same-work-same-wage constitutional principle. Although the Arbitration Council cannot enforce jail terms— such jurisdiction belonging to the court— in the process of rigorously implementing punishments for prohibited discrimination, we should expect more robust, rule-based and professional labor relationships to develop in Cambodia especially as the country opens up to freer skilled labor movements in the region.

¹⁰ Some other exceptions are usually permissible too such as when there is a valid seniority or merit system. Higher pay due to higher production volume (i.e., sales commissions) is also allowed.

¹¹ Labor Law 1997, article 369. Separately, the Criminal Code also punishes by imprisonment certain types of employment related discrimination pertinent to hiring and firing decisions (Criminal Code, articles 267,268,269), though not related to pay equality issue.

¹² For instance, in Canada, there is a principle of "equal pay for work of equal value." This principle uses a criteria consisting of four elements: skill, effort, responsibility, and working conditions. See Hermann Schwind, Hari Das and Terry Wagar (2007) *Canadian Human Resource Management. A Strategic Approach*. Toronto: McGrawHill,