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Anti-discrimination laws and work in the developing world: A thematic overview

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Introduction

This briefing note aims to provide a literature review of legal and other instruments aimed at addressing labor market discrimination in developing countries. The analysis takes place in the context of the understanding of jobs as providing the hinge connecting the three identified transformations at the centre of economic development: living standards, productivity gains and social cohesion. As Juan Somavia, ILO Director-General stated in June 2001: ‘Every day we are reminded that, for everybody, work is a defining feature of human existence. It is the means of sustaining life and of meeting basic needs. But it is also an activity through which individuals affirm their own identity, both to themselves and to those around them. It is crucial to individual choice, to the welfare of families and to the stability of societies.’ Yet many people are unable to access decent work because of their gender, race, disability, sexual orientation, age or poverty. Disadvantage in the labor market is disproportionately concentrated among women, ethnic minorities, people with disabilities, older or younger people and poor people.

Discrimination impacts on *living standards* by excluding individuals from the labor market, consigning them to low paid, low quality or insecure jobs, subjecting them to victimization, violence, harassment or violence, or inhibiting their opportunities to benefit from promotions, training or personal development, simply because of their gender, race, ethnicity, sexual orientation, age, disability or other group characteristic.

Discrimination impacts on *productivity* by excluding potentially productive workers from the workforce and failing to capitalize on their full potential. Although some economists view anti-discrimination laws as a burden on business,¹ it has been forcefully argued that equality laws are demonstrably capable of serving economic and particularly efficiency-based ends.² For example, in the European Union, the impetus for gender equality has been seen through an ‘economic prism’, which characterizes the disadvantaged position of women in the labor market as a source of economic inefficiency, and therefore includes sex equality within its strategy to achieve economic competitiveness.³ Thus, according to the European Social Model, ‘quality in work goes hand in hand with both productivity and overall employment performance, and policies for improving the quality of work can also help to increase the number of jobs.’⁴ Similarly, according to the ILO, the social exclusion of people with disabilities from the workforce deprives societies of an estimated US\$1.37 to 1.94 trillion in annual loss in GDP.⁵ As the EU Guidance Note on Disability and Development puts it: ‘If the interests of disabled people

¹ R Epstein, *The Case against Employment Discrimination Law* (Harvard University Press, Cambridge, Mass 1992); R Posner, "An Economic Analysis of Sex Discrimination Law," 56 *University of Chicago Law Review* 1311; S Polachek and W Siebert, *The Economics of Earnings*: (Cambridge University Press., Cambridge 1993).

² S. Deakin. "Labor Law as Market Regulation" in P. Davies et al (eds.), *European Community Labor Law: Principles and Perspectives* (Clarendon Press, 1996); S. Deakin and F. Wilkinson. 1994. 'Rights vs. Efficiency?' 23 *ILJ* 289.

³ S. Duncan. 1996. "Obstacles to a Successful Equal Opportunities Policy in the EU." 3:4 *European Journal of Women's Studies*. p. 399-422.

⁴ European Commission Employment in Europe Report 2002; see also S. Deakin and J. Browne. "Social Rights and Market Order: Adapting the Capability Approach." in T.H.J. Kenner (ed.), *Economic and Social Rights under the EU Charter of Fundamental Rights* (Hart, 2003).

⁵ Robert L. Metts. 2000. "Disability Issues, Trends and Recommendations for the World Bank." World Bank Washington D.C.

are not recognized then the key goal of poverty reduction in developing countries will not be achieved.⁶

Discrimination can also have serious consequences for *social cohesion*, whether in its explicit forms of hatred, prejudice, violence and harassment, or in its more insidious forms of condemning certain groups to low quality jobs, joblessness or job insecurity.

This is not true only of discrimination in the labor market itself. Discrimination in education prevents individuals from achieving their potential and therefore contributing to a productive and cohesive society. Discrimination in property, marriage and personal laws make it impossible to enter the paid labor force on equal terms.

The current report begins with a brief discussion of methodology, before turning to (i) de jure equality; (ii) anti-discrimination laws; (iii) the informal sector; and (iv) implementation (including affirmative action).

Methodology

Scope

International human rights law and many legal systems address discrimination in a broader sense than that often used in neo-classical economics, which regards discrimination as related only to outcomes which cannot be attributed to differences in productivity-enhancing characteristics.⁷

Discrimination in the legal context can be understood in three dimensions. The first is inequality before the law. This refers to *de jure* discrimination either in the formal legal system or at customary law. The second refers to unequal *treatment* on the grounds of gender, race, disability, sexual orientation, poverty or other status. This is often known as direct discrimination or disparate treatment. The third dimension of discrimination addresses unequal *impact* of policies, practices or rules, including mal-distribution of social benefits, under-representation of certain groups in employment or representative structures, and institutional inequalities. This is often known as substantive equality, and includes legal conceptions of indirect discrimination or disparate impact. Substantive equality goes beyond formal equality in that it addresses disadvantage even if there has been equal treatment. Labor market outcomes are affected by all these layers of discrimination.⁸ Generally, these three dimensions are complementary. However equality of results might require inequality of treatment on a prohibited ground. In particular, affirmative action might specifically require one group to be preferred over others in order to compensate for antecedent disadvantage and achieve genuine equality of results. It is for this reason that some legal systems prohibit affirmative action. This briefing note considers all three dimensions.

⁶ European Union, Guidance note on disability and development for EU delegations and services, March 2003.

⁷ J Humphries and J Rubery (eds), *The Economics of Equal Opportunities* (Equal Opportunities Commission, Manchester 1995) p.2.

⁸ For further elaboration see S Fredman, *Discrimination Law* (2nd edn Oxford University Press, 2011) Chaps 1 and 4.

The scope of discrimination laws varies from country to country. Many countries have constitutional guarantees which cover State action, and separate statutory provisions, which cover private as well as public discrimination. Some have separate provisions for discrimination in the labor market, and discrimination in other sectors, such as education, health and the provision of services. Since discrimination within the labor market is heavily influenced by inequalities prior to the market, this briefing note takes a holistic view, considering discrimination in relation to resources apart from paid employment, such as property and finance; as well as discrimination in relation to the capacity to compete in the market, including the role of education, health, family responsibilities and personal security.

Coverage

Since it is impossible to generalize across different legal systems or to cover all developing countries, the Briefing Note focuses on a number of selected developing countries in each of the major regions of the world, depending on the availability of literature. Among low income countries, the briefing note considers Kenya, Bangladesh and Nepal; among lower middle income countries, it examines India, the Philippines and Zambia; and among upper middle income countries, it examines South Africa, Botswana, Brazil, Jamaica and the Czech Republic. The countries were chosen to reflect a spread of different cultural, regional, historical and developmental factors, as well as the availability of literature in English.

The main sources in the survey have been the reporting mechanisms of the main international discrimination law conventions, the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). All the recent reports of these bodies have been dealt with. Material from the ILO, the International Convention on Civil and Political Rights (ICCPR), the International Convention on Economic, Social and Cultural Rights (ICESCR), the European Union (EU) and the African Commission on Human and People's Rights (ACHPR)⁹ has also been included where relevant. Primary materials include constitutions and statutes from individual countries, where available, and some secondary materials where accessible. The Inter-American Commission for Human Rights (IACHR) has not produced a country report on Brazil since 1997, and of the complaints against Brazil under its individual petition system, only two concerned discrimination, both in relation to domestic violence, since 2000. There has been no country report on Jamaica, and the individual petitions primarily concern capital punishment rather than discrimination. Thus the IACHR has not been a relevant source for this survey.

The role of law

This Briefing Note describes and analyses legal provisions addressing discrimination in the broad sense mentioned above. It uses comparative law methodology to compare and contrast legal provisions within an analytic framework based on the principles of equality set out here. The aim is to demonstrate the range of different legal provisions, to highlight the gaps in some areas and to point towards more comprehensive measures in others.

⁹ ACHPR concluding observations Botswana 2010; Nigeria 2008; Kenya 2007; South Africa 2005.

Impact

There are very few studies which assess the extent to which anti-discrimination laws reduce labor market discrimination. This is partly because, given that laws are of universal application, it is difficult to find an appropriate control. Some U.S. studies have compared different states within the federation, which introduced legislation at different times, but the authors of these studies acknowledge the difficulty in attributing straightforward causation.

The OECD, in a study published in 2008, pointed out in relation to OECD countries that ‘evaluations of national legislative efforts to ban discrimination are scarce. Cross-country evaluations are even scarcer. Indeed, no cross-country comparable time-series of the degree of stringency of anti-discrimination regulations is available.’¹⁰ To address this lacuna, the OECD, drawing on previous work by Weichselbaumer and Winter-Ebmer (2007), used ratifications of international conventions on discrimination ILO’s Conventions on Equal Remuneration for Men and Women Workers for Work of Equal Value and on Discrimination in Respect of Employment and Occupation and CEDAW as proxies for domestic anti-discrimination laws. They found that ratification of all three anti-discrimination conventions was associated with a reduction in both the gender employment gap and the gender pay gap. They concluded that ‘overall, available evidence confirms that anti-discrimination legislation can have a significant impact on labor market disparities.’

More specific studies have been done in the United States on the impact of anti-discrimination legislation on race and gender differentials in labor market performance.¹¹ According to the OECD, these studies also showed that anti-discrimination laws help to improve the relative labor market situations of ethnic minorities. There is less evidence about gender, but some studies show similar positive effects. These effects were shown to materialize over time as enforcement capacity and ability increased and public opinion changed.¹² However, anti-discrimination laws need to be carefully designed to prevent side-effects. For example, some evaluations suggest that introducing gender equal pay provisions without non-discrimination provisions on hiring and dismissal could widen gender employment practices.¹³ This suggests that provisions on hiring and dismissal need to go hand in hand with equal pay provisions.

The paucity of properly conducted evaluative studies in the OECD countries is replicated and aggravated in the developing countries in this survey. It has thus proved impossible to provide evaluative evidence of the impact of specific anti-discrimination provisions on labor market discrimination *per se*, and therefore to give a global assessment of their effectiveness. The OECD nevertheless concludes that there is sufficient evidence to show that anti-discrimination laws, if well designed, can be effective in reducing labor market discrimination.

¹⁰ OECD. “The Price of Prejudice” OECD Employment Outlook 2008, p.185.

¹¹ Donohue, J. and J. Heckman. 1991. “Continuous Versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks,” *Journal of Economic Literature*, Vol. 29, No. 4, pp. 1603-1643.; Donohue, J. (2005), “The Law and Economics of Antidiscrimination Law”, Yale Law School, John M. Olin Center for Studies in Law, Economics, and Public Policy, Working Paper No. 290; Altonji, J. and R. Blank. 1999. “Race and Gender in the Labor Market,” in C. Ashenfelter and D. Card (eds.), *Handbook of Labor Economics*, Vol. 3C, Amsterdam: North-Holland.

¹² Ibid.

¹³ Oyer, P. and S. Schaefer. 2002. “Sorting, Quotas, and the Civil Rights Act of 1991: Who Hires When It’s Hard to Fire?” *Journal of Law and Economics*, Vol. XLV, pp. 41-68.

It should be noted that the impact of anti-discrimination laws might also be considered on a number of other levels. One is whether they provide sufficient redress for individual victims. It is therefore necessary not just to consider the substantive law, but the compliance and remedial measures, including the cost and speed of enforcement mechanisms, the availability of legal aid, the protections against victimization, and the role of State and non-State bodies, such as human rights commissions, inspectorates and trade unions. Enforcement is considered below. A second possible impact is whether anti-discrimination laws set standards more generally for the behavior of employers, the State and others responsible for discrimination. This requires awareness of the existence of standards, and a combination of deterrent and incentive measures. As the OECD puts it, ‘the merit of anti-discrimination laws resides not only in their capacity to repress unwanted behaviors and compensate victims, but also in their capacity to induce cultural change and redefine socially acceptable practices. Anti-discrimination legislation is, however, only one possible tool to combat discrimination and more research is needed on positive action and incentive schemes that can elicit virtuous behavior.’¹⁴

This Briefing Note therefore concentrates on the design of anti-discrimination laws, including how comprehensive they are, both in personal scope and coverage, what aspects of discrimination are prohibited, what remedies are provided and how accessible those remedies are. On the few occasions when evaluative studies on impact of aspects of the design are available, it has attempted to include them.

The role of international law

The Briefing Note considers the ways in which international law, particularly CEDAW, CERD and ILO Conventions 100 (the Equal Remuneration Convention) and 111 (the Discrimination (Employment and Occupation) Convention) , have interacted with domestic law. Ratifying states are obliged to meet the standards set in treaties to which they are signatories.¹⁵ In some systems, international law is automatically part of the domestic legal system (monist systems) but in most, domestic legislation is required to make international obligations binding (dualist systems). In such cases, the State has the obligation in international law to enact such legislation.

The main mechanism for compliance of these treaties is through the requirement to report periodically to the relevant committee. The committee’s responses are normally framed as recommendations and suggestions rather than binding law. For example, ILO member countries are required to make an annual report to the International Labor Office on the measures which they have taken to give effect to the provisions of Conventions to which they are a party. CEDAW and CERD have similar periodic reporting obligations.

There are also ways in which individuals or groups might bring matters to the attention of the relevant body. Thus under the ILO, there is a procedure which gives trade unions and

¹⁴ OECD Employment. “The Price of Prejudice: Labor Market Discrimination on the Grounds of Gender and Ethnicity.” p184.

¹⁵ The elimination of discrimination in respect of employment and occupation is one of the four fundamental principles in the ILO Declaration of Fundamental Principles and Rights at Work, and Conventions 100 and 111 are regarded as core principles of the ILO. ILO Convention 100 has been ratified by 169 countries; while ILO Convention 111 has been ratified by 170 countries.

employers' organizations the right to make representations that their country is in breach of a Convention. These are referred to the Committee on Freedom of Association, in the case of complaints under the relevant Conventions on freedom of association, or to the Committee of Experts on the Application of Conventions and Recommendations, in the case of other Conventions. A similar procedure was introduced for CEDAW in 2000, when a new Optional Protocol entered into force. The Protocol gives the CEDAW committee power to hear complaints from individuals and groups as well as to initiate inquiries into situations of grave or systematic violations of women's rights. By 2012, the Optional Protocol had attracted 79 signatories. The Committee has adopted 10 decisions under the Protocol, none of which concerned the countries under consideration in this Briefing Note. It has also mounted one investigation, concerning Mexico. Similarly, the CERD Committee may consider individual communications relating to States parties who have made the necessary declaration under article 14 of CERD. Of the 54 communications under Article 14, only 10 violations were found, and none of them concerned the countries under consideration here. Both ICCPR and, most recently, ICESCR, have individual communications procedures, but here too, little extra information has been gleaned. This Briefing Note therefore concentrates on periodic reports rather than individual communications.

This briefing note aims to assess the extent to which domestic legal systems are compliant with the demands of CERD, CEDAW and these two ILO Conventions, by examining the observations of the committees to whom the states in question are required to report. The Briefing Note is dependent on the extent to which the country in question fulfils its reporting obligations, the timing of the reporting cycle, and the responses of the relevant committee in its assessment of compliance. The result is inevitably a somewhat patchy one. Moreover, it is difficult to show whether these Conventions directly influence legislative change within individual states, or whether other, internal processes bring States into compliance. This briefing note does not, therefore, attempt to show the direct impact of the international standards on national law in a causative sense. It concentrates on whether the legal system is in fact compliant.

Many countries in the survey have 'plural' systems of law, in that the legal system recognizes the existence of religious or indigenous law as binding in certain arenas, usually in relation to marriage, divorce, succession or other 'personal' laws. As will be seen, in some systems, the constitution exempts such parallel legal systems from the constitutional equality guarantee, while others subordinate them to the overriding principle of equality. So far as international law is concerned, the State is required to bring all its law into compliance with international standards it has ratified, regardless of whether they are religious, customary or indigenous legal systems which are condoned by the State.

Formal equality

In many jurisdictions, inequality remains enshrined in law, particularly in relation to women, homosexuals, disabled people and ethnic minorities. This is true for a range of rights, including rights to property, social security and contract. In addition, many identity groups are excluded from the most fundamental legal protection, namely protection against violence, whether by husbands, employers, peers or the State itself. Without such rights, labor market participation is severely compromised: where workers can access jobs at all, they are likely to be precarious or on poor terms and conditions. Indeed, it is increasingly recognized that poverty is perpetuated by

the exclusion of a vast number of poor people from the scope of legal protection. The report of the UN Secretary General on Legal Empowerment of the Poor and Eradication Of Poverty in 2009 pointed to the fact that in many developing countries, laws, institutions and policies do not afford equal opportunity or protection to a large segment of their populations, most of whom are poor, minorities, women and other disadvantaged groups.¹⁶ The report points particularly to the fact that, despite the global recognition of the principle of equality, women and girl children continue to face discrimination and inequalities in access to land, property, the labor market and inheritance.¹⁷ Thus de jure inequalities function as a real impediment to the ability of jobs to improve living standards, productivity and social cohesion in ways which facilitate economic development.

This part considers the extent to which de jure inequalities persist in the countries under consideration, and the ways in which the law itself might support or condone inequality.

De jure inequality: Criminalizing homosexuality

Homosexuality is still a criminal offence in 80 countries in the world. Of the countries considered here, these include Bangladesh, Botswana, Jamaica, Kenya, and Zambia. India's sodomy laws were only very recently held to be in breach of the equality provision in the Indian Constitution.¹⁸ Even if homosexuality is not itself a criminal offence, there remain numerous restrictions on Lesbian, Gay, Bisexual and Transsexual (LGBT) people from accessing equal rights before the law, including restrictions on same-sex partnership or marriage, equal immigration rights for same-sex partners, equal rights of adoption, equal access to occupational pensions, survivors' pensions and other work-related benefits for same-sex partners, and equal access to social security benefits. LGBT people are also subjected to high levels of violence and harassment, both within the workplace and in public spaces.

De jure inequality: Personal laws

Many countries in the world still have legal provisions which overtly discriminate against women in both positive law and customary legal systems. These include a number not covered expressly in this report, such as Egypt, Iran, Saudi Arabia, and Syria. However, they also persist in several of the countries covered here. This is particularly true for 'personal laws', or laws broadly related to marriage, inheritance, and property ownership. Here customary and religious laws are permitted to trump the fundamental equality guarantee.

The fact that women are subjected to de jure discrimination in relation to marriage, succession, divorce, custody of children, social security and other rights has significant consequences for their ability to access paid work, particularly work which might be regarded as a hinge to transformation of living standards, productivity and social cohesion. Women who are subject to early marriage, to treatment as minors under the guardianship of male relatives, to eviction from their property on widowhood, and other legal forms of discrimination, are inevitably highly limited in their ability to undertake paid work, or to benefit from paid work in terms of income,

¹⁶ United Nations General Assembly Report of the Secretary General Legal Empowerment of the Poor and Eradication of Poverty (A/64/133), 2009, accessible at <http://www.undp.org/legalempowerment/library.shtml>

¹⁷ Ibid at para 15.

¹⁸ *Naz Foundation v Government of NCT of Delhi*, WP(C) No.7455/2001, 2 July 2009 (High Court of Delhi).

training, career progression or solidarity at work. Lack of protection from the law has particularly grave consequences for poor women. As the UN Commission on Legal Empowerment of the Poor puts it, 'it is not the absence of assets or lack of work that holds [poor people] back, but the fact that the assets and work are insecure, unprotected and far less productive than they might be.'¹⁹ Conversely, by providing security of livelihoods, of shelter, tenure and contracts, the law can enable and empower the poor to lift themselves out of poverty and to protect themselves.²⁰

In some countries de jure inequality is enshrined in the constitution. This is true for both Botswana and Zambia. Thus the Constitution of Botswana expressly exempts laws pertaining to divorce, adoption, marriage, devolution of property and other personal and customary law from the Constitutional equality guarantee.²¹ This has permitted continuing discrimination against women in customary law and practice, including early marriage, polygamy, and the continued practice of legal guardianship by men of unmarried women.²² Similarly, in Zambia, whereas Article 11 of the Constitution guarantees the equal status of women, Article 23(4) permits discriminatory laws and practice in the area of personal and customary laws. Examples of practices which might fall within this exception include early marriage, payment of lobola (dowry), property grabbing by the husband's family on his decease, sexual cleansing (ritual sex with a deceased husband's relative), and polygamy. In rural areas, customs and tradition practices frequently prevent women from inheriting or acquiring ownership of land and other property and from accessing financial credit and capital.

In some countries, de jure discrimination persists in statute or customary law even if not condoned expressly in the Constitutional equality clause. This is true for Nigeria, where several discriminatory statutes remain.²³ In the Philippines, despite the Constitutional guarantee of equality before the law, the Code of Muslim Personal laws permits polygamy and the marriage of girls under 18. Forced marriages are still tolerated.²⁴

In other countries, complex compromises have been made between equality guarantees and customary or personal laws. In India, Article 44 of the Constitution provides that "The State shall endeavor to secure for the citizens a uniform civil code throughout the territory of India." However, as the Court put in it the *Shah Bano* case: 'It is a matter of regret that Article 44 of our Constitution has remained a dead letter.' The result is that the personal law of each of the major religious groups is regulated by their own religious law. A series of cases have been brought in the Indian courts attempting to apply the general equality guarantee to personal laws (often Muslim personal law) which treat women as inferiors to men.

In South Africa, the strong impetus was to respect customary law as an equality issue in itself, the rationale being that customary law, having been subordinated by colonial laws, and to some extent distorted by apartheid laws, should be given its proper place in the new constitutional

¹⁹ Commission on Legal Empowerment of the Poor, *Making the Law work for everyone* (2008) pp1-2.

²⁰ United Nations General Assembly Report of the Secretary General Legal Empowerment of the Poor and Eradication of Poverty (A/64/133), 2009; para 6.

²¹ Constitution of Botswana, s.15.

²² CEDAW concluding observations Botswana 2010, para 13.

²³ CEDAW, concluding observations Nigeria 2008, para 316.

²⁴ CESCR, concluding observations Philippines 2008, para 18.

order. Thus the Constitution states: ‘The Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.’²⁵ Moreover, ‘The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.’²⁶ As the Court put it in the *Bhe* case: ‘Our basic law specifically requires that customary law should be accommodated, not merely tolerated, provided the particular rules or provisions are not in conflict with the Constitution.’²⁷ However, the Constitution establishes a clear hierarchy, allowing the Court to strike down customary laws which infringe equality. Thus in *Bhe*, the customary law of male primogeniture (by which only male relatives of the deceased could inherit property) was found to be in breach of the Constitution. The Court stated: ‘The exclusion of women from inheritance on the grounds of gender is a clear violation of section 9(3) [the right to equality] of the Constitution. It is a form of discrimination that entrenches past patterns of disadvantage among a vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with the guarantee of equality under this constitutional order. The principle of primogeniture also violates the right of women to human dignity as guaranteed in section 10 of the Constitution as, in one sense, it implies that women are not fit or competent to own and administer property. Its effect is also to subject these women to a status of perpetual minority, placing them automatically under the control of male heirs.’²⁸

Important progress is being made in many of the other countries under consideration. The new Zambian draft constitution declares that all laws, customary or regulatory that permit or have the effect of discriminating against women are void.²⁹ The Philippines adopted a Magna Carta for women in 2009, which requires the State to review and repeal all discriminatory laws over the next three years.³⁰ In Nepal, as part of the Constitutional process leading to the interim Constitution in 2007, the 2006 Gender Equality Act was passed revising discriminatory provisions in the areas of property, marital rape and the age of marriage. In Kenya, the new Constitution passed on 2010 provides that any law—including customary law—that is inconsistent with the Constitution is void.³¹

However, change is still slow in coming. In Zambia, as we have seen, rural widows still frequently face challenges in maintaining their property rights;³² in the Philippines there is still a total prohibition on divorce and abortion;³³ and in Nepal, discriminatory legal provisions relating to unequal inheritance rights for married daughters have not yet been repealed and there is no clear legislation providing for an equal share of marital property on dissolution of marriage.³⁴ In India, although some laws have been modified to remove gender inequality, there remain

²⁵ South African Constitution, s.39(3).

²⁶ South African Constitution s.211(3).

²⁷ *Bhe v Khayelitsha Magistrate (CCT 49/03)* [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (South African Constitutional Court).

²⁸ *Ibid.*

²⁹ Section Constitution of Zambia Bill 2011, s.40.

³⁰ Magna Carta of Women (Republic Act No. 9710).

³¹ Constitution of Kenya, 2010, art 2(4).

³² CEDAW concluding observations Zambia 2011, para 37.

³³ CESCR Philippines 2008.

³⁴ CEDAW concluding observations Nepal 2011, para 33.

discriminatory personal laws.³⁵ In South Africa, although extraordinary change has been brought about since the end of apartheid, it was only recently that the Constitutional Court held that customary laws on inheritance were discriminatory against women and some customary and religious laws and practices which discriminate against women in marriage and family relations remain lawful.³⁶ In Kenya, the proposed unified Marriage Bill does not prohibit polygamy. Moreover, discriminatory Muslim inheritance laws remain exempt from constitutional review, and Khadi courts, established under the new Constitution for hearing Muslim family law matters including inheritance, are exempt from constitutional equality provisions.³⁷

Rule of law: Protection against violence

A second serious obstacle to equal participation in the workforce takes the form of violence against women, whether in the home, the workplace or in other public spaces. Poverty and violence interact in a vicious cycle. Women who lack sufficient economic resources may have to engage in transactional sex, exposing them to heightened levels of violence. Poverty also forces women to carry out daily activities which put them at higher risk, such as fetching wood and water, accessing work-places at night, working as domestic workers in other people's households, or engaging in precarious work generally.

The scale and prevalence of violence against women in the jurisdictions under consideration are striking, as consistently recorded in the reports of the UN treaty monitoring bodies such as CEDAW and CERD. This is true of the Philippines, Nepal, Bangladesh, Brazil, Nigeria, Botswana, India, South Africa and Zambia. Violence includes domestic violence, rape, acid throwing, dowry related violence, fatwa-instigated violence and sexual harassment at work, with alarming rates of violence against migrant women, Dalit women, and women from ethnic minorities. The threat of rape and sexual assault is a particular problem for women and girls living in urban slums and informal settlements, where lack of access to adequate sanitation facilities exacerbate the risks of sexual violence.³⁸ The fact that women and children are increasingly targeted by combatants in the course of armed conflict led the UN Security Council in 2000 to pass Resolution 1325 'reaffirming the important role of women in the prevention and resolution of conflicts and in peace-building, and stressing the importance of their equal participation and full involvement in all efforts for the maintenance and promotion of peace and security, and the need to increase their role in decision-making with regard to conflict prevention and resolution.'³⁹

Several countries with serious problems of violence against women have recently passed legislation relating to domestic and other violence,⁴⁰ but patterns of violence continue. Thus

³⁵ CERD Original Report India 2006, para 81.

³⁶ CEDAW concluding observations South Africa 2011, para 41.

³⁷ CEDAW concluding observations Kenya 2011, para 11.

³⁸ CEDAW concluding observations Kenya 2011, para 73.

³⁹ Resolution 1325 (2000) Adopted by the Security Council at its 4213th meeting, on 31 October 2000. See also Resolution 1820 (2008), Resolution 1888 (2009), Resolution 1889 (2009), and Resolution 1960 (2010).

⁴⁰ For example, Philippines (Anti-Violence against Women and their Children Act 2004, Rape Victims Assistance Act 1998, Anti -Rape Law 1997; Anti-Sexual Harassment Act of 1995); Zambia (Anti-Gender Based Violence Act 2011); Nepal (Domestic Violence (Crime and Punishment) Act 2009); Bangladesh (Domestic Violence Act 2010; Prevention of Cruelty to Women and Children Act, Acid Crime Control Act, Child Marriage Restraint Act and the

while legislation on marital rape, protection against domestic violence and sexual harassment at school and at work is essential, it is also necessary to have effective implementation, including cultural change. The CEDAW committee has regularly urged State parties to give priority attention to combating violence against women and girls, including (i) effective legislation on domestic violence, incest, marital rape, assault and sexual harassment at work; (ii) effective implementation, including prosecutions and deterrent sanctions; (iii) access to justice through accessible courts; (iv) training of police, public prosecutors, the judiciary and other relevant government bodies and wider awareness-raising programs, including men and boys; (v) provision of shelters; (vi) prevention of extra-judicial punishments through fatwas. A persistent problem is the absence of proper collection of data, or detailed studies on the causes, scope and extent of violence or the impact of measures taken to prevent, punish and provide protection for victims. (For legislation on sexual harassment at work, see further below.)

Women are not the only victims of violence. Ethnic violence is still a serious hindrance to those seeking work or aiming to provide for themselves. This has been particularly apparent in the Czech Republic where the CERD reported in 2011 its concern over reports of a growing number of incidents of acts of violence against Roma people, including setting dwellings alight.⁴¹ Homophobic violence is also highly problematic in many countries.

Customary laws and practices

CEDAW consistently refers to the persistence of patriarchal attitudes and deep-rooted stereotypes in relation to women's roles and responsibilities which perpetuate their subordination. Inevitably, these affect their ability to obtain decent work and need to be addressed if women are to participate fully in the paid labor market. Some of these are a result of customary law and traditional norms and practices. These include:

- in the case of Botswana, widowhood rites and practices, the payment of bogadi (dowry) and privileges in favor of men, such as their customary right to treat their wives in the same way as minor children;⁴²
- in the case of Zambia, harmful practices such as sexual cleansing,⁴³ polygamy, bride price (lobola) and property grabbing;⁴⁴
- in the case of Nepal, harmful traditional practices, such as child marriage, the dowry system, son preference, polygamy, and accusing widows of witchcraft. A particularly harmful practice is that of chaupadi, according to which women and girls are banished from the house during menstruation. Despite a ban being imposed by the Supreme Court on the chaupadi tradition in 2004, the practice remains widespread. Also highly

Dowry Prohibition Act); Brazil (Law 11340 (The Maria da Penha Law) of 7 August 2006 on domestic and family violence against women);

⁴¹ CERD concluding observations Czech Republic 2011, para 16.

⁴² CEDAW concluding observations Botswana 2010, para 23.

⁴³ A practice whereby a widow is required to have sex with a male relative to 'cleanse' her of her husband's ghost. It was reported in 2009 that the Zambian chiefs had decided to ban practices of sexual cleansing and spouse inheritance: see *Zambian Post* 23 November 2009. http://www.postzambia.com/post-read_article.php?articleId=2263&page=1.

⁴⁴ CEDAW concluding observations Zambia 2011 para 19.

problematic is the practice of deuki, whereby young girls are offered up to the local temple in the hope of gaining protection from the gods. Deukis are often forced into prostitution from a very young age and, because they are deemed impure, have no prospects of marriage or future employment. This practice too has been formally abolished in Nepal, but continues to occur in some areas.⁴⁵

- in the case of South Africa,⁴⁶ entrenched harmful cultural norms and practices, including ukuthwala (forced marriages of women and girls to older men through abduction), polygamy and the killing of ‘witches’;
- in the case of Nigeria, harmful traditional and cultural norms and practices, including widowhood rites;⁴⁷
- in the case of Kenya, harmful practices, including female genital mutilation (FGM), polygamy, bride price and wife inheritance.⁴⁸

Discrimination laws

The problem

Even where de jure discrimination has been abolished, women and ethnic minorities continue to display high rates of disadvantage in the labor market in all the countries considered. This is true too in relation to health, education, housing, social security and other basic rights. High rates of female unemployment, job segregation, low pay, sexual harassment at work and a wide gender gap are characteristic of all the countries studied. Women cluster in low paid and precarious work, with little chances of advancement. A major reason is the fact that women remain primarily responsible for childcare and housework. Women are increasingly drawn into the paid labor force because their income is essential for family survival, but their responsibilities at home are undiminished.⁴⁹ This double burden makes it inevitable that they are only able to seek flexible, part-time or other forms of precarious work close to their homes and families. Moreover, because work in the home is unpaid and invisible, the same work done within the labor market is under-paid and undervalued. Alternatively, women are required to make a stark choice and leave their homes to work in other people’s houses or even to migrate to other countries to find work. In all these cases, their work tends to be low paid and insecure.⁵⁰

Race discrimination is a complex phenomenon in the countries surveyed. Given the key role of the specific history and ethnic makeup of different countries, ‘race’ is better identified as a social construct, signifying patterns of domination and subordination. In many of the countries surveyed, racial groups are highly disadvantaged in the workforce. A particular example is that of Brazil, where, although de jure discrimination on racial grounds has been banned since the

⁴⁵ CEDAW concluding observations Nepal 2011 para 17.

⁴⁶ CEDAW concluding observations South Africa 2011 para 21.

⁴⁷ CEDAW concluding observations Nigeria 2008 para 322.

⁴⁸ CEDAW concluding observations 2011 Kenya para 17.

⁴⁹ MS Floro and M Meurs, *Global Trends in Women’s Access to “Decent Work”* (Occasional Paper No. 43) (Friedrich-Ebert-Stiftung; ILO, Geneva 2009), 13.

⁵⁰ WIEGO, “Women and Men in Informal Employment.” Web: <http://www.wiego.org/publications/wiego.php>.

abolition of slavery in 1888, Afro Brazilians suffer significant levels of disadvantage in the workforce.⁵¹ In particular, there is a significant pay gap between Afro-Brazilians and white Brazilians, a gap which is particularly prominent in relation to Afro-Brazilian women.⁵² Similarly, in the Czech Republic, unemployment among Roma remains persistently high, and Roma continue to experience discrimination in the workforce.⁵³

Similar patterns of disadvantage are seen in relation to disability, although, because the reporting mechanism of the new Disability Convention is not set up and running, it is difficult to chronicle the discrimination faced by people with disabilities in the countries surveyed. Nevertheless, it is clear that they face significant discrimination. As has frequently been pointed out, disability causes poverty and poverty causes disability. An estimated 82 percent of disabled people in developing countries live below the poverty line, constituting between 15 and 20 percent of the poor in these countries.⁵⁴ According to the ILO, the level of unemployment among disabled persons is two or three times as high as for other persons. In many developing countries where unemployment is very widespread, the employment prospects of disabled persons are minimal or nonexistent. As O'Reilly puts it: 'Discouraged by discriminatory barriers and mistaken assumptions about their capacity to work, many withdraw from an active search for jobs, and rely either on disability benefits where these exist, or eke out a livelihood in low value-added work in the informal economy, with support provided by their families and community.'⁵⁵

There is little or no data on discrimination on grounds of sexual orientation, religion or age in the reports studied here. However, as mentioned above, several of the countries in this study still criminalize homosexuality, and LGBT people are subjected to considerable levels of harassment and violence both at work and in public spaces. Even if homosexuality is not outlawed, same-sex partners face discrimination in a wide range of situations, ranging from exclusion from occupational or social security benefits available to opposite-sex partners to prohibitions in relation to succession, immigration status or adoption and custody of children. Transsexual people are frequently required to maintain their previous identity for official purposes, prohibited from marrying and subjected to other forms of humiliation and exclusion.

Labor force discrimination in general has a corrosive effect on the labor market, whether in terms of standards of living, productivity or social cohesion. Discrimination condemns individuals to low paid and insecure jobs on the basis of their group identity and deprives the market of a pool of potentially productive workers. Workers who are subject to harassment and prejudice, or are deprived of training, promotion and other prospects because of their identity, are unlikely to be fully productive. Unequal pay distorts the market by forcing down the pay of women and other disadvantaged groups and job segregation creates artificial barriers. Moreover, decent work brings with it not just the possibility of improving living standards, but also a sense of belonging and purpose, generating social cohesion. Discrimination laws need to be fashioned in ways which address these problems. Constitutional equality guarantees and statutory provisions need

⁵¹ A. Gomes and P. Bertolin "Regulatory challenges of Domestic work: the case of Brazil" *Macgill labor Law and Development Research Laboratory Working Paper Series 2012*.

⁵² ILO CEASCR Individual Observation Convention 111 (Brazil) 2010.

⁵³ CERD Concluding Observations Czech Republic 2007, Para 5.

⁵⁴ A. O'Reilly. 2007. "The Right to Decent Work for People with disabilities." ILO <http://www.ilo.org/global/publications/lang--en/index.htm> p.vii

⁵⁵ Ibid.

to address job segregation, unequal pay, prejudice in recruitment and the setting of terms and conditions, prejudice against women on grounds of their pregnancy and maternity, harassment at work, and lack of education and training. Although not dealt with here, discrimination in relation to social security has an important knock on effect for discrimination in the paid labor force.

Scope and structure of legal provisions

Most countries have an equality guarantee within their constitutions. Such guarantees usually apply across all aspects of law and society, but generally only bind the State. Thus constitutional guarantees generally need to be complemented by statutory provisions. However the latter, where they exist, may be specific to a sector of society, such as employment, housing, education or social security.

In some jurisdictions, statutory coverage is patchy or non-existent. For example, the CEDAW committee commented in 2007 that India had still failed to implement its 2000 recommendations to introduce a Sex Discrimination Act binding on both public and private bodies.⁵⁶ In 2011, this had still not been remedied. It was not until 2009 that the Czech Republic introduced its Anti-Discrimination Act 2009. Several jurisdictions protect discrimination in relation to some aspects of employment and not others. For example, the Filipino Labor Code makes it unlawful to favor a male over a female with respect to promotion, training, study and scholarship grants, but, as the ILO has repeatedly pointed out, does not outlaw discrimination against women in hiring.⁵⁷ The Nepalese Constitution unusually prohibits both public and private discrimination, but, pending the results of its process of amendment of the labor laws, has no specific statute outlawing discrimination on the main grounds. In Bangladesh, the ILO Committee has repeatedly pointed out that the Constitution covers only the public sphere, leaving the private sphere unregulated.⁵⁸

Several countries have legislation which deals specifically with employment only. This makes it difficult to address all the factors that contribute to discrimination, such as housing, education and public services. For example the Kenyan Employment Act 2007 only prohibits racial discrimination in employment, and not in other areas where discrimination occurs frequently, such as in housing.⁵⁹ Discrimination in housing clearly impacts on the extent to which workers can access decent work. A notable exception to this is the Kenyan Persons with Disabilities Act 2003, which deals with employment, education, voting and health under one umbrella.

An even more holistic approach is found in the Filipino Magna Carta for Women, which aims to provide comprehensive protection for women against discrimination and violation of their rights. However, many of the provisions are aspirational, requiring further detailed legislation to become operational. For example, according to section 2 of the Magna Carta, the State is to provide opportunities for women to enhance and develop their skills and acquire productive employment and section 22 provides that: “the State shall progressively realize and ensure decent work standards for women that involve the creation of jobs of acceptable quality in conditions of freedom, equity, security, and human dignity.”

⁵⁶ CEDAW concluding observations (India) 2007, para 8.

⁵⁷ Filipino Labor Act s.135. See ILO CEASCR on Convention 111 Philippine, 2003, 2005, 2009, 2011.

⁵⁸ ILO CEACR Individual Observation on Convention 111 (Nepal) 2008.

⁵⁹ CERD concluding observations 2011, para 9.

Unlawful grounds of discrimination

The question of which groups should be protected by anti-discrimination law remains a contested one, both at national and international level. It is now generally accepted that workers should be protected against discriminated against on grounds of their race or sex, but legal instruments vary widely in the extent to which they include other groups, the most contested being that of sexual orientation. Indeed, even at international level, sexual orientation is notable by its absence in many instruments. Many instruments, however, contain lists which are ‘non-exhaustive’, using words such as ‘including’ or ‘other status’ to allow further judicial or other development as new forms of discrimination are recognized.⁶⁰

The content of the list of protected grounds found in constitutional and statutory provisions usually reflects the dating of the legal instrument, with more recent constitutional and statutory instruments including more expansive lists. Race and ethnicity generally appear even in the earlier constitutions, with sex being a somewhat more recent addition. This is true too at international level. Thus ILO Convention 111 refers to race, color, sex, religion, political opinion, national extraction or social origin. Both the ICCPR and the ICESCR refer to ‘race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’⁶¹ Sexual orientation, disability and age are all notable by their absence. The category ‘other status’ in the ICCPR and ICESCR is wide enough to include these, but the list in ILO Convention 111 does not expressly include such a possibility. The ILO has sought to remedy this under-inclusiveness in two ways: by issuing further non-binding recommendations and by including additional grounds of discrimination in their policies and programs to combat employment discrimination. Age and disability discrimination are addressed in the Disabled Persons Recommendation⁶² and the Older Workers Recommendation,⁶³ issued by the International Labor Conference. Both recommendations prohibit discrimination on the grounds of disability and age and require member states to promote ‘equality of opportunity and treatment’ workers,⁶⁴ by adopting measures to reasonably accommodate⁶⁵ disabled and older workers and to take positive steps to provide these workers with suitable employment opportunities.⁶⁶ While ILO instruments are silent on sexual orientation, the need to combat discrimination on this ground features prominently in the ILO’s concept of ‘decent work’—the organizing principle that guides the ILO’s activities.⁶⁷ This is reflected in the ILO Secretary-General’s reports on employment discrimination which consistently draw attention to discrimination on the basis of sexual orientation and applaud steps taken to address this form of discrimination.⁶⁸

⁶⁰ For a detailed discussion, see Fredman above note 8 chapter 3.

⁶¹ ICCPR Article 2; ICESCR Article 2.

⁶² Vocational Rehabilitation and Employment (Disabled Persons) Recommendation 168, 1983.

⁶³ Older Workers Recommendation 162, 1980.

⁶⁴ R 168, para 7; R 162, para 3.

⁶⁵ Disabled Persons Recommendation, paras 13 and 31; Older Workers Recommendation paras 5, 9 and 17.

⁶⁶ Disabled Persons Recommendation, para 10; Older Workers Recommendation, para 5.

⁶⁷ ILO. “Decent Work Agenda.” Web: <http://www.ilo.org/global/about-the-ilo/decent-work-agenda/lang-en/index.htm> accessed 2 February 2012.

⁶⁸ ILO, *Time for equality at work* (ILO, Geneva 2003) para 47; ILO, *Equality at work : Tackling the challenges* (ILO, Geneva 2007) paras 155-157; ILO, *Equality at work : The continuing challenge* (ILO, 2011) paras 205-211.

More modern Constitutions go well beyond these lists, to include disability, and age, but sexual orientation and nationality remain acutely sensitive and are found in relatively few. Newer grounds such as HIV status and poverty or socio-economic disadvantage are also found in some very recent constitutions or statutes, but they too are rare. Pregnancy and maternity are now also finding their place as self-standing grounds, independent of sex.

The South African Constitution contains one of the most wide-ranging lists of protected grounds, including 16 prohibited grounds, namely, race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.⁶⁹ The express mention of sexual orientation contrasts with the other Constitutions, and has been relied on in a fruitful set of cases which systematically outlawed sexual orientation discrimination.⁷⁰ Beginning with the invalidation of criminalization of sodomy,⁷¹ the Court went on to outlaw discrimination against same-sex partners in immigration,⁷² pensions,⁷³ and adoption,⁷⁴ culminating in the invalidation of marriage laws which required opposite sex partners.⁷⁵ Following the famous *Fourie* case,⁷⁶ the South African Parliament passed the Civil Union Act of 2007, permitting gay marriage. Similarly expansive lists are found in the two major pieces of equality legislation, the Employment Equity Act 1998 and the Promotion of Equality and Prevention of Unfair Discrimination Act 2000 (PEPUDA). Thus the Employment Equity Act refers to race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, sexual orientation, color, age, disability, religion, HIV status, conscience, language, political opinion, culture, belief and birth.⁷⁷ Under PEPUDA (which deals with non-employment related discrimination), the prohibited grounds are similar, covering race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. Notably, it also includes a broad provision, proscribing discrimination on '(b) any other ground where discrimination based on that other ground (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination [as defined in the Act]'.⁷⁸

One of the most modern Constitutions is that of Kenya, which took the opportunity to expand the list of protected characteristics considerably. Whereas the previous Constitution prohibited

⁶⁹ South African Constitution, s.9(3).

⁷⁰ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (12) BCLR 1517 (South African Constitutional Court); *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (South African Constitutional Court); *Satchwell v President of the Republic of South Africa and Another* 2002 (6) SA 1 (CC); 2002 (9) BCLR 986 (South African Constitutional Court); *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as amicus curiae)* BCLR 1006 (CC). 2003 (2) SA 198 (CC); 2002 (10) (South African Constitutional Court); K. Bellamy, F Bennett and J Millar, *Who Benefits? A gender analysis of the UK Benefits and Tax Credits System* (Fawcett Society, 2005).

⁷¹ *National Coalition for Gay and Lesbian Equality v Minister of Justice*

⁷² *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*

⁷³ *Satchwell v President of the Republic of South Africa and Another*

⁷⁴ *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as amicus curiae)* BCLR 1006 (CC).

⁷⁵ K. Bellamy, Bennett and Millar.

⁷⁶ *Ibid.*

⁷⁷ Employment Equity Act 1998, s6(1).

⁷⁸ Promotion of Equality and Prevention of Unfair Discrimination Act 2000 (Section 1 (xxii)).

discriminatory treatment on grounds of race, tribe, place of origin, or residence or other local connection, political opinions, color creed or sex, the new Constitution has a much more extensive list. Discrimination is prohibited on the grounds of race, sex, pregnancy, marital status, health status, ethnic or social origin, color, age, disability, religion, conscience, belief, culture, dress, language or birth.⁷⁹ At statutory level, the Kenyan Employment Act 2007 is equally expansive, prohibiting discrimination on grounds of on grounds of ‘race, color, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status.’⁸⁰

Given the role of the Constitution in addressing the ethnic and regional tensions which caused widespread disruption in 2007, the recognition of religious, ethnic and religious diversity is central. However, sexual orientation is notably absent, as is gender identity. Indeed, homosexuality remains a criminal offence in Kenya. On the other hand, Kenya has separate legislation for disability, in the form of the Persons with Disabilities Act 2003.

Not all recent Constitutions are even as expansive as this, even those which have been very recently adopted. The Jamaican Charter of Fundamental Rights and Freedoms, adopted in 2011 expresses the right to freedom from discrimination on grounds of race, place of origin, social class, color, religion or political opinions; and ‘being male or female.’⁸¹ Again, age and disability are excluded, as well as sexual orientation and gender identity. As in Kenya, legislation criminalizes consensual same-sex relationships, thus promoting discrimination against homosexuals.⁸² The Nepalese interim constitution provides that there shall be no discrimination (by the State or otherwise) on grounds of ‘religion, race, sex, caste, tribe, origin, language or ideological conviction or any of these.’⁸³ Nepal’s labor legislation does not, however, provide statutory protection against discrimination, and although several years have been spent attempting to draft new legislation, this has not yet been passed by the Nepalese legislature.

Other Constitutions are far less expansive. Thus in Botswana, the equality guarantee in Section 15 of the 1966 Constitution applies to differential treatment on the basis of race, tribe, place of origin, political opinions, color or creed. Gender was not included until an amendment in 2005.⁸⁴ Disability, age, sexual orientation, nationality and religion are not covered. The list is more expansive at statutory level: the Botswana Employment Act prohibits termination of employment on grounds of the employee's race, tribe, place of origin, national extraction, social origin, marital status, political opinions, sex, color or creed. Even here, however, disability, age, sexual orientation, and religion or belief is not included.

The influence of the U.S. Constitution, which declares that no person shall be denied the equal protection of the laws, is seen in several Constitutions. One of these is the Philippines Constitution of 1987. The only specific ground mentioned in the Philippines Constitution is S.14, which states: ‘The State recognizes the role of women in nation-building, and shall ensure the fundamental equality before the law of women and men.’ The CERD committee in 2009

⁷⁹ Constitution of Kenya, s.27(4).

⁸⁰ Employment Act 2007 (Kenya) s.5(3)(a).

⁸¹ Jamaican Charter of Fundamental Rights and Freedoms 2011 s.13(3)(i).

⁸² ICCPR concluding observations Jamaica 2011.

⁸³ Nepalese Interim Constitution 2007 s.13.

⁸⁴ ILO CEACR Individual Observation on Convention 111 (Botswana) 2010.

expressed its concern that there was no comprehensive anti-discrimination legislation on the elimination of discrimination on grounds of race, color, descent or national or ethnic origin covering all rights and freedoms protected by the CERD.⁸⁵ Article 14 of the Indian Constitution, reflecting almost precisely that of the 14th Amendment, states: ‘The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.’ Article 15(1) is, however, more specific, providing that ‘the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.’ Notably absent from this list are disability, sexual orientation and age. Nevertheless, in the seminal case of *Naz Foundation*,⁸⁶ the Delhi High Court held that the Indian Penal Code breached the constitutional equality guarantee insofar as it criminalized consensual sexual acts of adults in private. A similarly hybrid approach is found in the Brazilian Constitution of 1988, which states that all individuals are equal before the law and goes on to declare that ‘the law shall punish any discrimination attempted against fundamental rights and liberties.’ It does include a truncated list of grounds in relation to social rights, prohibiting any ‘difference in wages, in the performance of duties and in hiring criteria by reason of sex, age, color or marital status’; and any discrimination with respect to wages and hiring criteria of disabled workers.⁸⁷ It is unusual, however, in specifically providing for equal rights between workers in permanent employment and seasonal workers.

All members of the EU are bound by EU law to enact legislation prohibiting direct and indirect discrimination in relation to the six identified grounds: sex, race, religion or belief, sexual orientation, age and disability. Article 2 TEU declares that ‘the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.’⁸⁸ In addition, Article 157 TFEU provides for equal pay for work of equal value for men and women while Article 19 TFEU gives the EU power to take action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Under these powers, the EU has passed several pieces of legislation (or directives) in the field of discrimination. The most important of these are Directive 2006/54 of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (Recast Sex Directive); Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Race Directive); and Directive 2000/78/ EC of November 2000 establishing a general framework for equal treatment in employment and occupation (Framework Directive). Also of importance is the EU Charter of Fundamental Rights, particularly Article 21 which prohibits ‘any discrimination based on any ground such as sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation.’⁸⁹ The EU Charter does not in

⁸⁵ CERD concluding observations Philippines 2009.

⁸⁶ *Naz Foundation v Government of NCT of Delhi*, .

⁸⁷ Brazilian Constitution of 1988 Article 7 s.30 and 31.

⁸⁸ See also TEU Article 9.

⁸⁹ See also Article 22-26.

itself extend the field of application of EU law but has been relied on by the Court of Justice of the EU to give a broad interpretation of human rights.

It was not, however, until 2009 that the Czech Republic brought itself into full compliance with these provisions. The Anti-Discrimination Act of 2009 now prohibits discrimination on grounds of sex, age, sexual orientation, religion, disability and race. A longer list is provided in relation to employment, where the Employment Act 2004 prohibits discrimination on grounds of sex, sexual orientation, racial or ethnic origin, nationality, citizenship, social origin, birth, language, health status, age, religion or belief, property, marital and family status or family responsibilities, political or other opinion or membership or activity in political parties or political movement, trade unions or employer organizations.

The inclusion of pregnancy in the Kenyan and the SA Constitution is of particular importance. In Canada, the U.K., the U.S., and other jurisdictions, several attempts were made to show that discrimination on grounds of pregnancy is unequal treatment on the grounds of sex. The difficulty was that this required proof that a similarly situated man would have been equally badly treated. Early cases rejected such a claim on the grounds that there was no such thing as a pregnant male comparator. Later cases attempted to compare women to an ill male comparator. EU law made a breakthrough in this respect by regarding pregnancy as a species of sex discrimination without the need for a male comparator.⁹⁰ However, the inclusion of pregnancy as a ground of discrimination in its own right removes the need for such contortions. Notably, following the EU jurisprudence, in the Czech Republic, discrimination on grounds of pregnancy and maternity is considered discrimination on grounds of sex.

Cumulative disadvantage and multiple discrimination

Discrimination law is usually organized around fixed categories of potentially disadvantaged groups: women, ethnic minorities, people with disabilities and so on. However, many people belong to several overlapping identity groups. While this can enrich life and create community cohesion born from interlocking interests and concerns, it can also intensify disadvantage for those who belong to more than one disadvantaged group. For example, black women are subject to both sexism and racism. Ethnic minority women, older women, black women, and disabled women are among the most disadvantaged groups in many countries. Similar cumulative or multiple discrimination is experienced by gay or lesbian members of ethnic minorities; disabled black people; younger ethnic minority members or older disabled people. Moreover, disadvantage may not just be cumulative, but synergistic. In other words, the nature of the disadvantage is qualitatively different from that experienced by those who suffer disadvantage on one axis only.

International human rights instruments are showing growing recognition of the issue. The World Conference for Women held in Beijing in 1995 drew attention to the fact that age, disability, socio-economic position, and membership of a particular ethnic or racial group could create particular barriers for women. The preamble to CEDAW emphasizes that the eradication of racism is essential to the full enjoyment of the rights of women. Correspondingly, in 2000, the CERD Committee adopted a general recommendation on gender-related dimensions of racial

⁹⁰ See further Fredman (above note 8) pp 169-171.

discrimination, which calls upon States parties to report on gendered aspects of race discrimination. Similarly, the preamble to the CRPD refers specifically to the difficult conditions faced by people with disabilities subject to multiple forms of discrimination on the basis of race, color, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status. The CRPD also recognizes that women and girls with disabilities are often at greater risk, both within and outside the home of violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation.⁹¹

Multiple discrimination is clearly evident in many of the countries under consideration. Cumulative disadvantage is experienced in a wide range of areas, especially in relation to access to education, employment, health care, housing, protection from violence and access to justice. For example, the CEDAW committee, reporting on the Philippines in 2006, noted its particular concern at the persistent practice of early marriage among Muslim women, and called upon the Filipino government to provide increased educational opportunities to Muslim girls to discourage early marriage.⁹² In other countries, the CEDAW committee has expressed its concern at a range of different sources of multiple discrimination. Thus in its report on Zambia in 2011, the Committee expressed its concern at the de facto discrimination experienced by older women, women with disabilities, refugee women and women in detention. It found that many of these women suffer social marginalization, exclusion, violence, poverty and isolation in all areas of Zambian society and particularly in rural areas.⁹³ The same was true in Nepal for Dalit and indigenous women, widows and women with disabilities,⁹⁴ and in Bangladesh, in relation to Dalit women, migrant women, refugee women, older women, women disability and girls living on the streets.⁹⁵

In its 2007 Report, the CEDAW Committee was particularly concerned at the ongoing atrocities committed against Dalit women in India, and the culture of impunity for perpetrators of atrocities. It called on India to achieve more effective enforcement of the Scheduled Castes and Scheduled Tribes Prevention of Atrocities Act in order to ensure accountability and end impunity for crimes committed against Dalit women. Also a continuing source of severe disadvantage is the practice of manual scavenging. CEDAW has urged India to do more to address the obstacles to eradicating manual scavenging, including establishing modern sanitation facilities and providing the Dalit women engaged in this practice with vocational training and alternative means of livelihood. It also encourages India to increase Dalit women's legal literacy and improve their access to justice in bringing claims of discrimination and violation of rights.⁹⁶

CEDAW also pays special attention to rural women. Thus in its report on the Philippines in 2006, it expressed its concern about the precarious situation of rural and indigenous women, who lack access to adequate health services, education, clean water and sanitation services, and credit facilities. It called upon the State to pay special attention to the needs of these women, ensuring

⁹¹ See also ILO, "Time for equality at work," Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, Report I(B), International Labor Conference 91st Session, Geneva, 2003, p.37.

⁹² CEDAW concluding observations 2006 Philippines, para 29.

⁹³ CEDAW concluding observations 2011 Zambia, para 39.

⁹⁴ CEDAW concluding observations 2011 Nepal, para 39.

⁹⁵ CEDAW concluding observations 2011 Bangladesh, para 37.

⁹⁶ CEDAW concluding observations 2007 India, para 28-9.

that they had access not just to these factors, but also to means to support themselves, such as fertile land and income-generation opportunities, together with participation in decision-making.⁹⁷ In Zambia, women already suffering cumulative disadvantage were particularly prone to violence, poverty and isolation in rural areas.⁹⁸

Particularly serious is the cumulative discrimination experienced by Roma women. Both in 2006 and again in 2011, the CEDAW committee expressed concern at the vulnerable and marginalized situation of Roma women and girls in the Czech Republic, especially in relation to health, education, employment and participation in public life and decision-making.⁹⁹ Uninformed and involuntary sterilization of Roma women has been a key concern. CEDAW called upon the Czech Republic in 2006 to take effective measures to eliminate multiple discrimination against Roma women and girls, including strengthening coordination among all agencies, and providing a clear plan with specific timetables and stated goals. However, 2010 found the CEDAW committee expressing the same concerns and making the same recommendations.¹⁰⁰

The risk of cumulative discrimination increases in times of conflict. Thus in its 2011 report on Kenya, CEDAW expressed its concern about internally displaced women who continue to experience gender based violence in refugee camps, urban slums and informal settlements.¹⁰¹

There are several difficulties in addressing cumulative discrimination. One lies in the absence of data. Thus in relation to Zambia, Bangladesh, Nepal, Czech Republic and Brazil, CEDAW noted the lack of sufficient data, making it impossible to reach a comprehensive picture. The Committee therefore urges States to collect disaggregated data on multiple discrimination.¹⁰² It also calls for the adoption of legal provisions, public education and awareness-raising campaigns and proactive measures, including temporary special measures to eliminate such discrimination. The second difficulty concerns the ways in which grounds are specified in constitutional guarantees or anti-discrimination statutes. Where lists are limited or non-exhaustive, it may be difficult to persuade a court to consider more than one ground at a time. In some jurisdictions, such as the U.K. and the U.S., cumulative discrimination has been limited to no more than two grounds. On the other hand, some constitutions have potential to combine any of those listed. Thus Article 15(1) of the Indian constitution provides that ‘the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth *or any of them.*’ Equality guarantees which include the possibility of extension, under a rubric of ‘any other status’ also have the potential to address multiple discrimination. Even then, the problem arises as to whom to compare the disadvantaged person with. Should a black woman compare herself with a black man or a white woman? Neither would reveal the unique cumulative disadvantage of being both black and a woman. One way forward is to move away from a comparative

⁹⁷ CEDAW concluding observations 2006 Philippines, para 29.

⁹⁸ CEDAW concluding observations 2011 Zambia, para 39.

⁹⁹ CEDAW concluding observations Czech Republic 2006, para 21; CEDAW concluding observations Czech Republic 2010, para 42.

¹⁰⁰ CEDAW concluding observations Czech Republic 2010, para 42-43.

¹⁰¹ CEDAW concluding observations Kenya 2011, paras 43-44.

¹⁰² CEDAW concluding observations 2011 Zambia, para 39; CEDAW concluding observations 2011 Bangladesh, para 37; CEDAW concluding observations Brazil, paras 35-36; CEDAW concluding observations 2011 Nepal, para 39; CEDAW concluding observations Czech Republic 2006 para 29.

approach to one simply based on unfavorable treatment because of the one's identity, but it is unlikely that the countries under consideration have moved in this direction.

Legal definitions of discrimination

Principles¹⁰³

There are various ways of defining discrimination in law. The basic conception is the equal treatment principle. If A is treated less favorably than B because of A's gender, race, sexual orientation etc, then A has been subjected to unlawful discrimination. However, the equal treatment principle is limited in several ways. In many situations, it is difficult to find an appropriate comparator (B). Examples include pregnancy and disability. In other situations, equal treatment might yield very different results. An apparently neutral criterion, which is applied regardless of race, gender, disability or other protected status, might nevertheless have a disproportionate impact on ethnic minorities, women or people with disabilities because of a history of discrimination and disadvantage. Moreover, it might be necessary to treat one group better than others in a transitional phase to make up for the prejudice and disadvantage experienced by that group historically or outside of the labor market. Finally, the equal treatment principle might be fulfilled by 'leveling down', that is by removing a benefit from the better-off group.

The meaning of discrimination has therefore evolved in many legal systems from one which focuses on equal treatment to one which additionally aims to address patterns of disadvantage and inequality within a workforce or beyond. Particularly important has been the concept of disparate impact, which applies in cases in which, although everyone has been treated equally, the effect is that members of some groups are disproportionately disadvantaged. For example, a requirement of a high school education for a manual job might be equally applied to all, but would disadvantage those, such as Afro-Americans, who might have been excluded from schooling because of previous disadvantage. According to the disparate impact principle, equal treatment will be held to be discriminatory if it has a disproportionate impact on a protected group, unless the requirement is necessary for the proper execution of the job in hand. Disparate impact migrated across the Atlantic to the U.K. in the form of the conception of 'indirect discrimination,' which in turn was adopted, in modified form, by the EU¹⁰⁴ and became binding on all member states.

The legal concept of discrimination has also developed to address situations in which the 'equal treatment' is not relevant, such as in discrimination on grounds of pregnancy, sexual harassment, or disability. Particularly important has been the development of the duty of 'reasonable accommodation' or 'reasonable adjustment.' According to this principle, the status quo is discriminatory when reasonable adjustments have not been made to include a person with disabilities or members of other protected groups. Reasonable accommodation might include

¹⁰³ For a more detailed exposition see Fredman (above note 8) chap.1 and chap.4.

¹⁰⁴ See Directive 2006/54 of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (Recast Sex Directive); Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Race Directive); Directive 2000/78/EC of November 2000 establishing a general framework for equal treatment in employment and occupation (Framework Directive)

adjustments to premises or timetables or the introduction of specific technology for the benefit of the person. Although primarily aimed at people with disabilities, the duty of accommodation is also important for religious and ethnic discrimination. In countries with wide ethnic disparities, it is important the equal treatment should not constitute a demand to assimilate to the dominant culture, but instead to accommodate differences. Discrimination law has been traditionally based on individual claims against individual perpetrators. However, in recent years, new proactive equality laws have been introduced. Rather than waiting for an individual claim of discrimination, proactive equality laws require public bodies, employers or others to take steps to promote equality. These are dealt with in detail below.

The gender pay gap has generally been dealt with by separate equal pay legislation, which also incorporates the radical notion of work of equal value. First introduced by the ILO in Convention 100 in 1951, this allows comparisons not just between a man and a woman doing the same work, but also between a man and a woman doing work which is of equal value, reflecting the level of skill, responsibility, training, exertion and other things. Since women's work, reflecting the work done unpaid in the home, is frequently undervalued in the market, this has the potential to make an important contribution to narrowing the pay gap. The principle of equal pay for equal work therefore permits discrimination law to address pay differentials caused by segregation of women into low paying 'women's work', rather than to focus only on situations in which women are paid less than men for doing the same work. Equal value legislation is, however, unusual in relation to race, disability or other protected characteristics.

At constitutional level, the right not to be discriminated against has frequently been defined in terms of proportionality. Not all differential treatment amounts to discrimination; only that which is disproportional to legitimate aims. The traction achieved by proportionality depends on how strictly it is interpreted—which aims are legitimate, and how closely should the means (differential treatment) be tailored to achieve those ends?

International law

As in many domestic regimes, the ILO has two separate conventions, one dealing with equal pay for men and women (Convention 100 on Equal Remuneration) and one on discrimination in employment more generally (Convention 111 on Discrimination in Employment and Occupation). The definition of discrimination in Convention 111 is as follows:

For the purpose of this Convention the term *discrimination* includes:

- (a) Any distinction, exclusion or preference made on the basis of race, color, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;
- (b) Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.'

The Committee of Experts on the Application of Conventions and Recommendations has developed this open-textured definition over the years to reflect the evolving principles identified above. In particular, the reference in the definition to the *effect* of distinctions, exclusions or preferences has made it possible to develop a conception of indirect discrimination. Thus the

CEACR insists that Contracting States express include a definition of discrimination which includes both direct and indirect discrimination.¹⁰⁵

CEDAW and CERD define discrimination in almost identical terms. Thus under CEDAW, discrimination means ‘any distinction, exclusion or *restriction* made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. Under CERD, ‘racial discrimination shall mean any distinction, exclusion, restriction *or preference* based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.’ Again an almost identical formula is found in the CRPD, which states: “Discrimination on the basis of disability” means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. The CRPD does, however, make the important addition of an explicit statement that discrimination includes denial of reasonable accommodation.

There are several other international and regional instruments which address and define discrimination. It is not possible to deal with all of them within the scope of this Briefing Note. However, it is fair to say that the format adopted by the ILO, CEDAW, CERD and the CRPD function as the benchmark by which others can be assessed.

National law

The equal treatment principle remains the dominant conception of equality in most of the jurisdictions covered here. An example is Botswana, where both the constitution and statute prohibit only direct discrimination.¹⁰⁶ The Nepalese constitution simply refers to equality before the law.¹⁰⁷ However, there are examples of highly developed statutory definitions of discrimination in some of the most modern statutes. A particularly striking example is the Kenyan National Cohesion and Integration Act (No.12) of 2008 which contains a detailed definition of both direct and indirect discrimination, closely reflecting those found in EU and UK law. Thus Section 3(2) provides that a person discriminates if ‘he applies to that other person a provision, criterion or practice which he applies or would apply equally to persons not of the same race or ethnic or national origins as that other, but-(a) which put or would put persons of the same race or ethnic or national origins as that other person at a particular disadvantage when compared with other persons,(b) which puts that other person at that disadvantage; and (c) which he cannot show to be a proportionate means of achieving a legitimate aim.’ The Czech Republic, being bound by EU law, also has detailed provision for direct and indirect discrimination. Another highly developed definition of discrimination is found in the Filipino Magna Carta for Women 2009, which reflects the definition in CEDAW: “Discrimination against women” refers

¹⁰⁵ See Report 2011, Afghanistan, p.408; ILO CEACR Individual Observation on Convention 111 (Botswana) 2010.

¹⁰⁶ Constitution of Botswana s.15 and Botswana Employment Equity Act s. 23(d).

¹⁰⁷ Nepalese Interim Constitution 2007 s.13-14.

to any gender-based distinction, exclusion or restriction which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.¹⁰⁸

Sexual harassment

The recognition of sexual harassment as a species of discrimination has been of real importance in the development of anti-discrimination law. At first, sexual harassment was dealt with as a species of direct discrimination, but like pregnancy, it encountered difficulties in finding an appropriate comparator. More recently, it has been dealt with in its own right. Rather than being regarded as a wrong because a woman is less favorably treated than a man, it is regarded as a wrong because it is an affront to the dignity and self respect of the victim. More developed conceptions of sexual harassment distinguish between two kinds of harassment: *quid pro quo* harassment, and harassment caused by an intimidating, hostile or humiliating work environment. Both EU law and the ILO recognize both these forms of sexual harassment; and the ILO requires contracting states to include both in their anti-discrimination legislation.

A prohibition on sexual harassment has been only partially introduced in many of the countries under consideration. For example, in Botswana, it is only an offence in relation to public employment.¹⁰⁹ In India, it was the Supreme Court which took the initiative in relation to sexual harassment. In the famous *Vishaka* case, the Court declared that sexual harassment of a female employee at work violated a woman's fundamental right to life under Article 21 of the Constitution.¹¹⁰ The Court laid down guidelines for the prevention of sexual harassment of women employees in their workplace. Bangladesh has followed a similar pattern to that in India. The Labor Act 2006 prohibits behavior in establishments that employ female workers "which may seem to be indecent or repugnant to the modesty and honor of the female worker",¹¹¹ but the ILO rightly observed that provision is legally uncertain. However, in *Bangladesh National Women Lawyers Association v Government of Bangladesh and Others*, in a landmark judgment of 14th May 2009, the Bangladesh High Court of 14 May 2009, like its Indian counterpart, issued guidelines on sexual harassment. Relying heavily on international Conventions and norms, again like the Indian High Court, the Bangladeshi Court provided a detailed definition of sexual harassment covering both *quid pro quo* and hostile environment harassment. It stipulated that its guidelines should be observed in all workplaces and educational institutions in the public and private sectors. The guidelines require employers and educational institutions to institute measures to raise awareness about sexual harassment, as well as establishing a complaints mechanism and disciplinary action. A draft law based on this judgment has been proposed.

The Kenyan Employment Act 2007 is again relatively progressive in relation to sexual harassment, including both 'quid pro quo' harassment and harassment resulting from a hostile environment.¹¹² However, only employers of more than 20 employees must adopt and implement a policy statement on sexual harassment. The Czech Republic, again because of

¹⁰⁸ Magna Carta s.3(a).

¹⁰⁹ Botswana Public Service Act, s.32(1) and (2).

¹¹⁰ *Vishaka v State of Rajasthan* AIR 1997 SC 3011 (Supreme Court of India).

¹¹¹ Labor Act 2006, s.332.

¹¹² Kenya Employment Act, 2007, s.6.

mandatory EU law, includes a provision on sexual harassment.¹¹³ However, neither Zambia nor Nepal expressly includes protection.

Reasonable accommodation

One of the best examples of duties to provide reasonable accommodation is found in EU law, which binds the Czech Republic. Thus under EU law, reasonable accommodation for disabled persons requires employers to ‘take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer.’ It expressly states that the burden on the employer will not be disproportionate ‘when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.’¹¹⁴

Also an excellent example of the duty to provide accommodation is the Kenyan Persons with Disabilities Act 2003.¹¹⁵ This is particularly innovative in providing financial incentives for employers to employ and accommodate people with disabilities. Thus a private employer who employs a person with a disability can apply for a tax deduction worth 25 percent of the salary of the employee. Moreover, a private employer who improves or modifies physical facilities or provides special services to reasonably accommodate disable employees may apply for an additional tax deduction worth 50 percent of the costs.¹¹⁶

Positive duties to promote equality

Remedies for discrimination have traditionally centered on adjudicative models, whether through the criminal law, or through civil law models, according to which the individual has the responsibility for taking the initiative in bringing a complaint to an adjudicative body (see ‘Compliance’ below). Such models assume that discrimination is a result of a specific act by a perpetrator against a victim, which should be remedied through punishment of the perpetrator and compensation to the victim. However, this approach is limited in its ability to bring about change. It depends on either the State to use its resources to bring a criminal prosecution, or the individual to find both the courage and the financial resources to bring a claim in her own right. Trade unions or equality bodies might assist, but the procedure remains expensive and slow.

More fundamentally, an adjudicative model of this sort assumes that discrimination is based on the fault of a perpetrator, and therefore cannot address institutional and structural discriminatory patterns. Adjudicative models are retrospective, individualized and expensive. A good example is that of equal pay for men and women. Since pay is usually set through collective bargaining or pay scales covering whole groups and grades of workers, it is better remedied through addressing the collective agreement or pay scales of an enterprise as a whole. As is evidenced in the U.K., individualized equal pay litigation, requiring each individual to bring her own claim based on a male comparator within her enterprise, is extremely costly and slow and perpetuates

¹¹³ Czech Employment Act s.4(1)-(12).

¹¹⁴ Directive 2000/78/ EC of November 2000 establishing a general framework for equal treatment in employment and occupation (Framework Directive), Article 5.

¹¹⁵ Kenyan Persons With Disabilities Act, 2003, s.15(5).

¹¹⁶ Kenyan Persons with Disabilities Act, 2003, s.16.

an adversarial approach.¹¹⁷ Moreover, this individualized approach does not encourage proactive measures to avoid the impact of new policies or measures, nor does it require positive action to promote equality.¹¹⁸

The limitations of individual complaints-based remedies for discrimination have led to a new generation of equality laws, which require public bodies, employers or others to take steps to promote equality. This does not necessarily entail requiring quotas or reservations. Instead, its focus is on assessing the impact of policies and law on disadvantaged groups and adjusting such policies so as to lessen the impact (impact assessment). It also requires the development of plans and timetable to institute equality of opportunity, for example, through training, wider recruitment, adjustment of working hours, reasonable accommodation and so on. This positive approach can also be detected in ILO Convention 111, which requires Member States to do more than just prohibit discrimination. It also requires Member States to pursue policies with the aim of eliminating discrimination (Article 2). A similar wording is found in CEDAW, CERD and the Disabilities Convention, which require States to ensure and promote the full realization of the rights therein. Most explicit are ICESCR and the new Disabilities Convention which expressly require States to take steps to the maximum of their available resources to achieve the full realization of the rights therein.

Several of the jurisdictions under consideration have incorporated proactive measures. The Brazilian government has recognized that it is not sufficient simply to prohibit discriminatory practices: instead, the prohibition against discrimination must be combined with promotional strategies which can accelerate progress towards achieving equality.¹¹⁹ Thus the 1988 Constitution provides, as one of its fundamental rights, the protection of the labor market for women through specific incentives, as provided by law.¹²⁰

The Kenyan Employment Act 2007 places a duty on the Minister, labor officers and employers to promote equality of opportunity in employment in order to eliminate discrimination in any employment policy or practice.¹²¹ In an even more forceful provision, the Kenyan Persons with Disabilities Act 2003 puts a duty on the government to ‘take steps to the maximum of its available resources with a view to achieving the full realization of the rights of persons with disabilities’ set out in the statute.¹²² The South African Employment Equity Act imposes positive duties to eliminate discrimination and harassment on all employers, with more extensive obligations on employers with more than 50 employees. Chapter V of the Promotion of Equality and Prevention of Unfair Discrimination Act (South African Equality Act) extends positive duties to promote equality and to eliminate discrimination to all persons not covered by the Employment Equity Act, but these provisions have not yet been brought into force. Recent EU law imposes a positive duty to encourage public and private actors to ‘take effective measures to

¹¹⁷ S Fredman, "Reforming Equal Pay Laws" [2008] 37 ILJ 193 - 218

¹¹⁸ S Fredman, "Making Equality Effective: The Role of Proactive Measures" (European Commission, Brussels 2009).

¹¹⁹ CERD Original Report (Brazil) 2004, para 38.

¹²⁰ Brazilian Constitution 1988 Article 7 s.20.

¹²¹ Employment Act 2007 Kenya, s.5(1)(a) and (b), s.5(2) and (7).

¹²² Kenyan Persons with Disabilities Act 2003, s.11.

prevent all forms of discrimination on grounds of sex in access to employment, vocational training and promotion,¹²³ which is binding on the Czech Republic.

Equal pay for work of equal value

Although there is a wide gender pay gap across all the countries in consideration, many countries do not have express equal pay legislation. One example is Botswana. In other jurisdictions, provision is made for equal pay, but it is generally confined to equal pay for the same work, rather than for work of equal value. This is true for Nepal, where the interim Constitution prohibits discrimination in regard to remuneration and social security between men and women for the same work.¹²⁴ The 1993 Labor Rules were even more limited, providing for equal remuneration only between male and female workers ‘engaged in work of the same nature’ in the same establishment.¹²⁵ In India too, the directive principles of the Constitution envisage equal pay for equal work for men and women. However, the Equal Remuneration Act 1976 mandates equal pay only for equal work or work of the same nature.

While equal pay for like work is an important means to prevent blatant prejudice against women, it cannot affect situations in which women are segregated into jobs which are under-valued because they are ‘women’s work’. Examples include catering, cleaning, caring and clerical work, all of which are traditionally undervalued. Indeed, a wide gender pay gap is almost invariably associated with widespread job segregation. Only if the value of jobs can be compared in terms of skills, responsibility, training, and heaviness of work can this problem be addressed. It is this which the concept of equal value attempts to achieve, and it is for this reason that the ILO Convention insists on equal pay not just for the same work, but also for work of equal value.

Some jurisdictions now include the right to equal pay for work of equal value. However, in some cases, this is simply regarded as a synonym for like work. Thus the Filipino Labor Code defines work of equal value to mean ‘activities, jobs, tasks, duties or services—which are identical or substantially identical.’¹²⁶ Bangladesh¹²⁷ and Kenya¹²⁸ do have provisions providing for equal pay for work of equal value. However, in Kenya at least, equal pay provisions only cover ‘employees’, so that they have no impact on the informal sector. Yet, as the CEDAW committee pointed out, women are concentrated in the informal sector, with no social security or other benefits.¹²⁹ Even if the right to equal pay for work of equal value is provided, provisions frequently fail to require an objective assessment of value, an issue which the CEDAW committee repeatedly flags. Other countries still have no provision for work of equal value. One of these is Jamaica, where for several years, the ILO Committee has been asking the Government to revise section 2 of the Employment (Equal Pay for Equal Work) Act 1975 which refers only to equal pay for to “similar” or “substantially similar” work, rather than work of a different nature but equal value. In South Africa, there is no express provision for equal pay for work of equal value, on the grounds that the prohibition on sex discrimination in employment covers

¹²³ Art 26 of the Recast Sex Directive.

¹²⁴ Nepal Interim Constitution 2007, Article 13(4).

¹²⁵ Labor Rules, 2050 (1993), Rule 11.

¹²⁶ Philippines Labor Code 135(a), Rules implementing the Republic Act No. 6725, s.5(a).

¹²⁷ Bangladesh Labor Act 2006, s.345.

¹²⁸ Employment Act 2007 (Kenya) s.5(4).

¹²⁹ CEDAW concluding observations 2011, para 33.

remuneration.¹³⁰ A proposed amendment to the Employment Equity Act expressly providing for equal pay for work of equal value is pending before Parliament. However, as in many jurisdictions, it is limited to a comparison only with other employees of the same employer.

Equal pay for work of equal value is generally confined to a comparison between men and women. However, occasionally, other grounds are included in the protection. The Brazilian Constitution, for example, prohibits differences related to wages, the performance of duties and hiring criteria by reason of sex, age, color or marital status.¹³¹

Minimum wage laws too can reinforce discrimination and occupational segregation. Thus in India, minimum wages allow different rates to be fixed for skilled, semi-skilled and unskilled work. However, work done by women in agriculture is often classed as unskilled (weeding or transplanting), while work traditionally done by men (such as ploughing) is considered to be semi-skilled. This too perpetuates the wage gap. Also important is the need to ensure that minimum wages are applied comprehensively and fully enforced. Thus the ILO received a complaint in relation to the Philippines that many companies were violating the minimum wage law, particularly in industries where women predominated, such as garments, electronics and food manufacturing.¹³² The CESCR Committee also found that minimum wage legislation did not apply to some important sectors, such as government employment and export-oriented and labor intensive manufacturing.¹³³

Protective legislation

Legislation which excludes women from certain jobs, such as night work or underground in mines, remains contested. Far from protecting women, such legislation often simply excludes women from accessing certain types of jobs. Rather than making such jobs safer for both men and women, protective laws remove these opportunities entirely from women. In India, for example, there remain widespread prohibitions on women working at night, although there are also provisions for exemptions where employment of women is necessary to prevent damage to raw materials.¹³⁴ A recent Supreme Court decision in India struck down legislation preventing women and young people from working in establishments which sell alcohol, and there is pressure to remove restrictions on night work too. However, it is crucial that measures are also put into place to protect women from some of the real risks of night work, particularly the high degrees of violence faced by women on the streets while travelling to work, poor public transport facilities and high levels of sexual harassment at the workplace which may well increase if night work is permitted.¹³⁵

¹³⁰ Employment Equity Act 1998, s.6.

¹³¹ Brazilian Constitution 1988 Article 7, s.30.

¹³² ILO CEACR on Convention 100 Philippine 2001.

¹³³ CESCR E/C 12/PHL/CO/4 1 December 2008, para 22.

¹³⁴ Factories Act 1948.

¹³⁵ Sankaran p.20.

Informal sector

The ILO coined the term ‘informal sector’ in the early 1970s to denote those who, despite working very hard, were not recognized, recorded, protected or regulated by the public authorities.¹³⁶ According to 2010 figures, the informal economy represents 52.2 percent of total employment in Latin America, 78.2 percent in Asia and 55.7 percent in Africa.¹³⁷ Yet workers in the informal economy have low incomes, low job security, no social protection and fewer possibilities for access to formal education and training.¹³⁸ A large number of women, ethnic minorities and other disadvantaged groups are employed in the informal sector. This is true for all the countries surveyed here, including Bangladesh;¹³⁹ the Czech Republic,¹⁴⁰ Kenya;¹⁴¹ Nepal; and Zambia.¹⁴² In the Philippines, it is estimated that as many as 44.6 percent of the total number of workers are excluded from the coverage of existing labor and social security legislation.¹⁴³ Similarly, Brazil has a highly regulated set of labor laws for the formal sector. But a large informal sector, estimated at as high as 50 percent of total employment, is left with very little protection. Unfortunately, too many children work in the informal sector.

The informal sector includes a multitude of different types of working relationships. As well as those working in the informal economy itself, such as street hawkers, the informal sector includes a wide range of precarious workers, who fall outside the protection of labor and discrimination laws despite the fact that they are in reality subordinate or dependent workers. These might include casual and seasonal workers, part-time workers, temporary and agency workers, home-workers, domestic workers, and unpaid family workers. This is because the workforce within the formal economy is becoming increasingly ‘flexibilized’, as employers attempt to cut labor costs or avoid regulation by hiring workers in non-standard relationships. One of the biggest challenges for labor law in general and discrimination law in particular is to find means of extending protection against discrimination to the informal sector.

Lack of legal coverage can be due to several factors.

- a) *The definition of the employment relationship*: Many labor codes extend protection only to workers who work under a contract of employment, which is defined variously to denote workers under the control of an employer, and who do not supply the capital or take the risks of loss or the chance of profit. Although these definitions aim to exclude only independent entrepreneurs, they tend in fact to exclude the most vulnerable workers, who do not have a contract of employment which fits the definition in many jurisdictions. Notably, these restrictions are not reflected in the ILO. Both ILO Convention 100 on Equal Remuneration and Convention 111 on Discrimination (Employment and Occupation) refer simply to workers, without limiting the coverage to workers employed under a contract of employment.

¹³⁶ ILO *Decent work and the Informal Economy* (2002) p.1.

¹³⁷ ILO *Extending the scope of application of labor laws to the informal economy* (2010).

¹³⁸ ILO *Extending the scope of application of labor laws to the informal economy* (2010).

¹³⁹ CEDAW concluding observations Bangladesh 2011, para 29.

¹⁴⁰ CEDAW concluding observations Czech Republic 2011, para 30.

¹⁴¹ CEDAW concluding observations 2011 Kenya, para 33.

¹⁴² CEDAW concluding observations 2011 Zambia, para 31.

¹⁴³ CESCR concluding observations Philippines 2008.

- b) *Eligibility criteria such as years of service or continuity of employment:* Labor laws might confine employment rights to employees who have worked for one or more years continuously for the same employer, thus excluding short-term and casual workers. For example in Zambia, workers are required to have two years' continuous employment from the date of recruitment as a condition for maternity leave.¹⁴⁴ Even if an enterprise is covered by the law in general, some of its workers might still fall outside the scope of the law due to these exclusionary criteria. Sankaran therefore points out that it is possible to talk of informal employment within a formal enterprise.¹⁴⁵
- c) *Triangular relationships: Agencies, labor brokers or temporary employment services:* The increasing use of agency workers complicates the ascription of responsibility towards the worker. In this triangular relationship, the contract is often between the worker and the agency, which in turn enters into a contract with the actual employer, client or 'end-user'. In such circumstances, courts may find that neither the agency nor the actual employer or end-user is responsible for breaching labor regulations or discrimination laws.
- d) *Contracting out or externalization:* By contracting out a service previously performed in-house, an employer might be able to escape anti-discrimination legislation. For example, most equal pay legislation requires a comparison between a man and a woman employed by the same employer. If, say, a public sector employer contracts out its cleaning or catering services, the women employed by the contractor may be precluded from claiming equal pay for work of equal value performed by employees directly employed by the public sector employer. This is because they have a different employer.
- e) *Deliberate exclusions:* Labor legislation might exclude workers such as domestic workers, family workers or others. In addition, labor laws might only apply to establishments over a certain size. For example most establishments in India employ fewer than 10 workers and are therefore below the threshold.¹⁴⁶ Migrant workers might also be excluded. Finally, blanket exclusions might operate in relation to export zones and other specific areas where labor regulation is deliberately suspended ostensibly to attract inward investment. This can manifest in exemptions of export zones from labor laws as in Pakistan, or in weak enforcement as in India.
- f) *'Work' excludes unpaid work:* This means that there is no protection for one of the chief forms of women's work. But even leaving aside unpaid work in the home, areas of work which are considered economic activity remain outside the law. Examples include unpaid family workers in agriculture and enterprises, including the work performed by children on family farms. Unpaid work in the home also has a direct effect on the nature of work which can be performed in the market. Much of the need to work in non-standard employment arises because of the need to combine paid work with unpaid work in the form of child-care and housework. In addition, many women perform voluntary work for which they are assumed not to need to be paid. An example are the anganwadi workers

¹⁴⁴ S.15(A) Employment Act and section 7(1) of the Schedule to the Order of 14 January 2002: CEACR individual observation on Convention 103 Zambia 2011.

¹⁴⁵ K. Sankaran. "Labor Laws in South Asia: The Need for an Inclusive Approach." p.3.

¹⁴⁶ K. Sankaran *Labor Laws in South Asia: The Need for an Inclusive Approach* p.4.

in India. These are village level workers who run the tens of thousands of Integrated Child Development Services and health care programs. Sankaran points out that they are not even paid minimum wages on the ground that they are volunteers working for a social cause. Instead, they are paid an 'honorarium' which is below the minimum wage.¹⁴⁷

- g) *Lack of enforcement*: Even where the informal sector is not excluded from legislative protection, workers in this sector may be de facto unprotected because of the absence of proper implementation. In many jurisdictions, regulatory bodies and inspectorates are seriously under-funded. An example is the Philippines, where the enforcement of minimum wage laws is made difficult by the shortage of labor inspectors.¹⁴⁸ In India, enforcement officers of the labor inspectorate give low priority to inspections in the informal sector, where only limited laws, such as minimum wage laws, apply. Enforcement in the informal sector is indeed resource intensive due to the scattered nature of establishments, lack of vehicles and support staff, making it easier to carry out inspections in large establishment in industrial zones.¹⁴⁹
- h) *Absence of Trade Unions*: By its nature, the informal sector is very difficult to organize collectively. Without trade unions, implementation of labor rights and anti-discrimination law is heavily dependent on State funded inspectors.

Lack of protection of workers in the informal sector can undermine labor rights more generally. This is not only indirect, in the form of competition from the informal sector; but also direct, in that employers are given an incentive to re-characterize the employment relationship in ways which avoid legal regulation. There are a variety of means of achieving this. Employment contracts can be configured specifically to avoid legal criteria for 'employees', so that vulnerable and precarious workers appear to be self-employed contractors. Workers can be employed on short-term contracts to avoid rights accruing once an eligibility period of employment has lapsed. Work can be contracted out and enterprises can be reconfigured so that the total number of employees remains below the minimum number of employees required for labor regulation. Sections of the workforce can be transferred to agencies or contracted out or to avoid equal pay comparisons within an establishment. All these devices have been regularly used in the UK, leading to a string of cases attempting to determine the boundaries of labor law. The ILO has named this problem that of a 'disguised employment relationship'. Disguised employment occurs when 'the employer treats an individual as other than an employee in a manner that hides his or her true legal status as an employee.'¹⁵⁰ It recommends that the determination of the existence of an employment relationship should be guided by the substance of the relationship, rather than the way in which it is characterized, in contractual documents or otherwise.¹⁵¹ Notably, ILO Convention 183 of 2000 on Maternity Protection gives rights to all women workers, 'including those in atypical forms of dependent work'.

South Africa provides a good example of the difficulty in addressing these problems. Figures from 2008 suggest that more than 30 percent of working South Africans earn their livelihood

¹⁴⁷ Sankaran p.17.

¹⁴⁸ CESCR concluding observations Philippines 2008.

¹⁴⁹ Sankaran p.17.

¹⁵⁰ Recommendation 198 Of 2006, Article 4(b).

¹⁵¹ Recommendation 198 of 2006, Article 9.

through informal work.¹⁵² Yet, as in many countries, the detailed code of labor legislation gives rights only to those covered by the statutory definition of an employee. An employee is defined as a person, except for an independent contractor, who works for another person or for the State and is entitled to receive or does receive remuneration, or any other person who assists in carrying on or conducting the business of the employer.¹⁵³ Only health and safety statutes apply to all work, regardless of the contractual arrangements.¹⁵⁴ Arguably too, the Constitution extends more broadly: Section 23(1) gives 'everyone' the right to fair labor practices.

The post apartheid labor market has, as in many other countries, been shaped by conscious attempts by many employers to reshape the employment relationship in order to evade their responsibilities under labor statutes.¹⁵⁵ One common strategy, similar to that seen in the U.K., was for employers to attempt to disguise the reality of an employment relationship by inserting stipulations into the contract according to which the worker purportedly agreed, explicitly or implicitly, that she was an independent contractor. Fortunately, the South African courts were eventually able to see beyond the form to the substance, and rejected such avoidance strategies as a 'cruel hoax and a sham.'

Following this lead, the legislature introduced a series of statutory presumptions in 2002. Reflecting the common law tests, the legislation presumes that a person earning less than a certain amount, is an employee provided she is 'under the control and direction' of the employer, or forms part of the employer's organization, or has worked an average of 40 hours per month for the same employer for the past three months, or is economically dependent on the employer, or works only for one person, or if the other person provides the tools of the trade.¹⁵⁶ This approach has been influential in other countries such as Tanzania.

Although the statutory presumption is helpful in guiding courts towards a finding in favor of employment rather than self-employment, it is a softening influence rather than a radical change. The statutory presumption can, after all, be rebutted. As of 2008, the approach had not been tested in courts, and therefore its effect was difficult to judge. This, as Fenwick, Kalula and Landau argue, is itself evidence of its limited effect. The weakness of enforcement mechanisms inevitably undermines even progressive legislation.¹⁵⁷

A second strategy is to use cooperatives as a pretext to employ workers outside of the protection of labor legislation.¹⁵⁸ A third and increasingly popular strategy is to employ workers through agencies, rather than directly, thereby creating a triangular relationship as mentioned above. Benjamin points to an increased use of outsourcing by private and public sector employers in South Africa and a massive increase in the use of labor brokers or agencies (known as

¹⁵² P Benjamin, 'Informal Work and Labour Rights in South Africa' [2008] 29 Industrial Law Journal (SA) 1579

¹⁵³ Labor Relations Act 1995, s.213; Basic Conditions of Employment Act 1997, s.1.

¹⁵⁴ Benjamin, p.1581. See the Occupational Health and Safety Act 85 of 1993, Mine Health and Safety Act 29 of 1996.

¹⁵⁵ S Mills, 'The Situation of the Elusive Independent Contractor and Other Forms of Atypical Employment in South Africa: Balancing Equity and Flexibility?' [2004] Industrial Law Journal (SA) 1203 at 1210; Benjamin, p.1582.

¹⁵⁶ Labor Relations Act 1995, s.200A; BCEA 1997, s.200A.

¹⁵⁷ C Fenwick, E Kalula and I Landau, 'Labour law: A Southern African perspective' International Labour Organization: International Institute for Labour Studies (2007)

¹⁵⁸ Benjamin, p1582.

Temporary Employment Services or TESs), where wages are significantly lower than those of directly employed workers.¹⁵⁹

The difficulty here is to determine whether it is the TES or the TES's client (the end-user) who is the employer and therefore responsible under the labor code. There have been cases in the UK in which a worker is found to have no contract of employment with either the end user or the agency. In practice, of course, although the agency may be responsible for paying the worker, the end-user is the employer in the sense of determining the work to be done and, indirectly or directly, the terms and conditions of work. South African labor law aims to regulate TESs by deeming the worker to be an employee of the TES and the TES to be her employer. The responsibility of the end user or client (of the TES) is, however, also acknowledged in that the latter is jointly and severally liable with the TES for any breach of the provisions of the Basic Conditions of Employment Act, or a collective agreement, or wage determination.¹⁶⁰

The law is slightly stronger in the case of unfair discrimination, where the worker is deemed to be the employee of the client or end-user, provided the TES has supplied the worker's services for more than three months or indefinitely. This means that the client can be liable for unfair discrimination under the Employment Equity Act.¹⁶¹ In addition, if the TES discriminates on the instructions of the client, both the TES and the client will be jointly and severally liable. As Fenwick, Kalula and Landau comment, the provisions are commendable in that they acknowledge that the client is in control of the workplace and directly or indirectly determines terms and conditions of employment. 'However, given the precariousness of temporary work and the minimal trade union activity amongst workers in this category, it is less likely that they have recourse to these labor law protections.'¹⁶² Moreover, they point out that the client is not responsible for unfair dismissal, 'a serious shortcoming, given the fact that it is usually the client's decision whether or not to dismiss.'¹⁶³

As well as workers in disguised employment of this sort, there are a considerable number who are employed by informal or non-compliant businesses, 'survivalist' self-employed workers such as street hawkers, and dependent contractors in South Africa. Benjamin also points out that the strict divide between an informal and formal economy is deceptive, with workers 'churning' or moving between formal employment, informal employment and unemployment regularly. Addressing disguised employment will not, therefore, address all the workers. Those who cannot be brought into the circle of protection even by a wide definition of 'employee' also merit protection against discrimination. Thus work by Supiot and others point to the need for workers to have rights qua workers, regardless of whether they can be deemed to have a contract of employment or not. Some possibilities include:¹⁶⁴

- (i) Ensuring all workers has the right to freedom of association, regardless of the nature of their employment.

¹⁵⁹ Ibid., p1583.

¹⁶⁰ Labor Relations Act s.198.

¹⁶¹ Employment Equity Act s.57(1).

¹⁶² Fenwick, Kalula and Landau, p.23.

¹⁶³ Ibid., p.23.

¹⁶⁴ See e.g. Benjamin, pp1590 ff

- (ii) The extension of existing labor laws to workers other than employees.
- (iii) Skills development for informal workers.
- (iv) Extension of social security benefits to informal workers.
- (v) Retention of rights accrued when in formal employment during periods in informal employment.
- (vi) Compensation for occupational injuries and diseases.
- (vii) Extension of health and safety at work legislation to all workers.
- (viii) Use of incentives, such as the availability of government contracts to those who score well on indices relating to informal workers.
- (ix) Support for unions and other civil society groups within the informal sector

Some efforts have been made in other jurisdictions to extend coverage to workers in the informal sector. The Philippines have attempted to enroll such workers into the social security system and philHealth.¹⁶⁵ In India, several commissions have investigated the possibility of extending labor laws to cover informal workers.

Below I consider some specific sectors of informal work and the nature of regulation.

Domestic workers

One of the most vulnerable groups in the informal sector is that of domestic workers. Recent ILO estimates based on national surveys in 117 countries, place the number of domestic workers at 53 million, but because they work in employers' homes, and for many their work is undeclared, it is believed that the total number could be as high as 100 million. According to the ILO, they make up at least 4-12 percent of wage employment in developing countries. About 83 percent of these workers are women or girls.

According to the ILO, one of the most striking changes in domestic work in the past 30 years has been the growing prevalence of migrant work. Migrant domestic work is a major source of employment for women from Sri Lanka, Philippines, Nepal, and India, large numbers of whom migrate to the Middle East, particularly Kuwait and Saudi Arabia. The growth in demand for domestic workers in the North has been the main reason for the mass migration of women from developing to developed countries, itself a response to lack of attention to proper work-life policies in the recipient states. Demand for domestic workers is growing with the decline of the extended family, ageing populations need help to care for the elderly and more working women need child-care and help with housework. This is exacerbated in a recession with the privatization of public services. Privatization of public services has led to demand for domestic workers, while at the same time intensifying the downward pressure on wages, and terms and conditions of work. Almost by definition, the wages of domestic workers are below those of

¹⁶⁵ CESCR concluding observations Philippines 2008.

their employers. At the same time, remittances from domestic workers constitute a major source of income for their countries of origin. In 22 countries, remittances were equal to more than 10 percent of GDP in 2006, and in six countries, they constituted more than 20 percent.¹⁶⁶

Domestic work can also have a significant racial dimension. The ILO found evidence of wage discrimination between migrant domestic workers in foreign countries, with Filipinos often paid better than others. South Africa is the obvious case where—under apartheid—there were almost no paid work opportunities for black women outside of domestic work in white households. In Brazil too, domestic workers are predominantly Afro-Brazilians. Of the 6.6 million domestic workers in Brazil in 2008, 94.3 percent were women and 61.8 percent Afro-Brazilian, many of who had no or only partial education at elementary school level. Indeed, domestic work was the single largest occupational category in the workforce and the single largest occupation for women.¹⁶⁷

There are many aspects of domestic workers' situation that desperately need legal protection. Live-in domestic workers have little control over their hours of work and little protection against verbal, sexual and physical abuse and other forms of exploitation. In Brazil, according to Gomes and Bertolin, domestic workers are the second biggest group of female victims of domestic violence after housewives.¹⁶⁸ Sexual harassment is particularly problematic, aggravated by the fact that workers are afraid to denounce their employers. Living and working in an employer's home has a major impact on a worker's personal autonomy and might make it difficult to have their own families, or acquire their own homes. The ILO points out that one consequence is that, on retirement, they may not have children to provide them with personal or financial support.¹⁶⁹

The demand for domestic workers is closely bound up with work-life reconciliation provisions. In Brazil, the high incidence of domestic workers takes place against a backdrop of both a patriarchal society which discouraged women from working in the paid labor market until the 1990s, and the lack of publicly funded social supports such as day care. In order to take up paid work outside the home, many women have delegated their child-care and housework responsibilities to other women, who have fewer resources. Gomes and Bertolin point out that domestic workers often leave home to work in other people's homes, leaving them no option but to delegate their own child care and domestic tasks to their older children, usually their daughters.¹⁷⁰ At the same time, the employers of domestic workers are often women working in low paid and precarious work themselves. The framing of legislation in relation to domestic workers must therefore address this complex layering of discrimination issues.

The first step in legal regulation of domestic workers is to recognize them as workers with rights, rather than as 'part of the family' or 'servants'. The ILO argues that proper regulatory

¹⁶⁶ ILO Decent Work for Domestic Workers 2010, paras 36-7.

¹⁶⁷ A. Moreira Gomes; P. Martins Bertolin 'Regulatory Challenges of Domestic Work: The case of Brazil (McGill Labor Law and Development Research Laboratory Working Paper Series), 2010 p.2. The ILO cites figures for 2005 of about 5 million domestic workers in Brazil, constituting 7.7 percent of the workforce in 2005 of which 93.3 percent are women: ILO Decent Work for Domestic workers 2010 p.6.

¹⁶⁸ Gomes and Bertolin, p.15.

¹⁶⁹ ILO Decent Work for domestic workers, 2010, para 27.

¹⁷⁰ A. Moreira Gomes; P. Martins Bertolin, 2010. "Regulatory Challenges of Domestic Work: The case of Brazil." *McGill Labor Law and Development Research Laboratory Working Paper Series*, p.5.

frameworks will also help conscientious employers, who otherwise bear the burden of setting individual standards within a complex personal relationship. However, this is insufficient on its own, particularly where domestic work is a compound of discrimination based on gender and race, as in Brazil and South Africa. As Gomes and Bertolin argue in relation to Brazil, ‘effective policies cannot be blind to the problems of a domestic worker as a woman and an Afro-Brazilian. Regulation is unlikely to improve their condition unless opportunities are created for access to education and subsequently to better paid jobs with decent conditions at work.’¹⁷¹ Also crucial are effective policies to address violence and sexual harassment of domestic workers. Gomes and Bertolin propose three sets of issues which should be addressed for effective regulation: (i) public policies directed to domestic workers, (ii) support for domestic workers trade unions; (iii) greater focus on the linkage between women and domestic work.

It is in the context of widespread invisibility and devaluation of domestic work that the campaign for an ILO Convention on decent work for domestic workers was fought. In a historic moment, in 2011, the ILO adopted the Convention Concerning Decent Work for Domestic workers with its accompanying Recommendation. The crucial contribution made by the Convention is to recognise the value of domestic work to the global economy, and of domestic workers as rights-bearers. The preamble emphasises the value domestic workers contribute to the global economy by facilitating the entry into the market of workers with family responsibilities; as well as providing care for ageing populations, children and persons with disabilities. It also recognises that domestic workers constitute a significant proportion of the national workforce in developing countries with scarce opportunities for formal employment, and that migrant workers facilitate substantial income transfers within and between countries. At the same time, it emphasises the extent to which domestic work is ‘undervalued and invisible and is mainly carried out by women and girls, many of whom are migrants or members of disadvantaged communities and who are particularly vulnerable to discrimination in respect of conditions of employment and of work, and to other abuses of human rights’.

The Convention, therefore, sends a powerful message as to the value of domestic work, and entitles and empowers domestic workers throughout the world. It also provides substantive protection in ways that aim to capture both the specificity of domestic workers and their equal membership of the paid labour force. For example, Article 3 of the Convention emphasises that all the ILO fundamental principles apply to domestic workers, including the right of freedom of association and the effective recognition of the right to collective bargaining. Article 7 requires Members to ensure that domestic workers are informed of their terms and conditions in an easily understandable manner. Article 11 requires members to ensure that domestic workers enjoy minimum wage coverage ‘where such coverage exists.’ In recognition of the importance of respect for bodily integrity and dignity, Article 5 requires Members to ensure that domestic workers ‘enjoy effective protection against all forms of abuse, harassment and violence.’ In addition, Article 6 requires Members to ensure that live-in domestic workers enjoy decent living conditions that respect their privacy. Article 10 states that domestic workers should enjoy equal treatment to other workers in relation to hours of work and other conditions of employment, including the right to at least 24 hours weekly rest. Article 9 recognises the importance of freedom of movement to privacy, stating that live-in domestic workers should not be obliged to remain in the household during periods of rest or annual leave. Thus far, the Convention has

¹⁷¹ Gomes and Bertolin p.14.

only received one ratification, from Uruguay. It will not come into force until 12 months after a second country has ratified.

At domestic level, there have been some moves towards including domestic workers within the protection of anti-discrimination laws in the jurisdictions covered here. The Brazilian Constitution stands out for its express inclusion of domestic workers within its equality guarantee. According to the Constitution, ‘the category of domestic servants is ensured of the rights set forth in items IV [minimum wage] VI [irreducibility of wages], VIII [year-end bonus], XV [paid weekly leave], XVII [annual paid vacation with remuneration at least one third higher than the normal wage] , XVIII [paid maternity leave of 120 days]; XIX [5 days paid paternity leave]; XXI [advance notice of dismissal] and XXIV [retirement pension] as well as integration in the social security system.’¹⁷² A constitutional amendment to extend all social rights in Article 7 of the Constitution to domestic workers has been announced. Brazilian labor law has also been moving in the direction of protecting domestic workers. Domestic employees now have a statutory right to 30 days paid vacation, protection for pregnant women, and the prohibition of deductions of pay for meals, housing and hygienic products supplied by the employer.¹⁷³ Domestic work under the age of 18 has been declared as one of the worst forms of child labor.¹⁷⁴

However, here—as in labor law more generally—a distinction is drawn between ‘employed’ and ‘self-employed’ domestic workers, with protection extending only to the former.¹⁷⁵ To address this issue, fiscal incentives are provided for employers who register their domestic workers with the National Social Security Institute, as part of a broader national policy seeking to expand social security coverage to the most vulnerable categories of workers. To encourage registration, social security payments made on behalf of one domestic worker may be deducted from the employer’s income tax liability, a scheme which is due to end in 2012.¹⁷⁶ It is too early to tell what impact these policies are having, although Tomei points out that the period from 2005-07 showed only a one percentage point increase in the numbers of domestic workers with a ‘carteira assinada’, entitling them to full protection. This is disappointing, considering that the Brazilian Ministry of Social Security had estimated that about 20 percent of informal domestic workers should have benefited from this measure.¹⁷⁷ These fiscal incentives come together with a three pronged pilot program, aimed at (i) improving the schooling and skills of domestic workers; (ii) strengthening their and their organizations’ ability to exercise representational rights and influence public policy and (iii) revaluing domestic work through awareness-raising campaigns. These measures are, however, only in the pilot stage and have as yet reached only a tiny number of workers. Tomes suggests that integrated measures, including legal protection, skills improvements and fiscal incentives, stand a good chance of working if framed within broader

¹⁷² Brazilian Constitution of 1988 Article 7, standalone paragraph.

¹⁷³ Act No. 11.324 of 2006.

¹⁷⁴ M Tomei, ‘Decent Work for Domestic Workers: an Achievable Goal or Wishful Thinking?’ in S Lee and D McCann (eds), *Regulating for Decent Work* (Advances in Labour Studies Palgrave Macmillan and ILO, 2011) 277.

¹⁷⁵ Gomes and Bertolin (above) pp6 ff.

¹⁷⁶ Tomei p.278.

¹⁷⁷ Ibid.

policies seeking to reduce the incidence of low-wage jobs and to narrow racial and gender inequalities.¹⁷⁸

Perhaps the most comprehensive regulation is found in South Africa, where the history of abuse of domestic workers under apartheid spurred exceptional attempts to achieve justice for domestic workers in the post-apartheid democratic state. There are currently about 1.2 million domestic workers in private households in South Africa, largely made up of African women. Since 1994, there have been several important ways in which protection has been extended to them. Firstly, the 1995 Labor Relations Act gave domestic workers the rights to freedom of association and protection against unfair dismissal. The South African Basic Conditions of Employment Act, 1997 (BCEA), which came into effect in 1998, includes domestic workers in some of its protections, such as the notice provisions, and with access to the Commission for Conciliation, Mediation and Arbitration. With effect from May 2002, the Unemployment Insurance Act 2001 was expanded to include domestic workers. This provides domestic workers with unemployment insurance benefits. Figures from 2005 show that the Uninsurance Fund had registered more than 632,000 employers and 500,000 domestic workers.¹⁷⁹

Particularly important, however, was the Domestic Worker Sectoral Determination 2002, which recognizes domestic workers as workers while at the same time making provision for the very specific needs of domestic workers which arise from the nature of their work: the fact that they work in their employers' home, and indeed sometimes live there; and the fact that they are particularly vulnerable to abuse. Thus the sectoral determination sets a minimum wage; prohibits payment in kind and unauthorized deductions; provides for a maximum working week (45 hours with a maximum of 15 hours overtime, paid at 1.5 times the regular pay), as well as proper breaks between shifts, mealtime breaks and three weeks leave per annum. It also recognizes the domestic workers' specific needs. For example, it lays down clear minimum standards for accommodating live-in workers and provides for 'standby' time, when a domestic worker is at the home of the employer and may be required for work. This period, between 10 pm and 6 am is paid at a flat rate, with a requirement of overtime pay for any time actually worked during that period. Domestic workers are also entitled to family leave and a four month period of maternity leave. South Africa is also ahead of other countries in extending protection both to domestic workers, defined as employees, and to independent contractors who perform domestic work in a private household and who receive, or are entitled to receive, pay.¹⁸⁰

One fear frequently expressed in relation to minimum wages for domestic workers is that higher wages might lead to fewer jobs. Hertz, however, found that the average real hourly wages of domestic workers rose by almost 20 percent between 2001 when the regulations came into effect and 2004. However, wages remain very low. The minimum wage for 2011 remains extraordinarily low, between R7.06 (\$0.88) and R9.85 (\$1.23)). Moreover, although Hertz found an improvement in the number of domestic workers paid below the minimum wage, in 2004 there were still 63 percent of domestic workers earning less than the applicable hourly minimum.¹⁸¹ Indeed, despite the rise in wages, domestic workers remain the lowest paid

¹⁷⁸ Ibid. P.279.

¹⁷⁹ Benjamin, p.1594.

¹⁸⁰ Sectoral Determination section 31.

¹⁸¹ Hertz supra.

category of workers in South Africa, earning just over half the hourly wage of the next lowest group, farm workers.¹⁸²

In other countries, some attempts have been made to incorporate domestic workers. The Labor Code of the Philippines expressly includes domestic workers. In 2011, the Zambian government for the first time issued regulations on minimum wages covering domestic workers.¹⁸³ As well as setting a minimum wage for domestic workers at K250,000 (\$48) per month, the regulations restrict hours of work to 48 hours a week, and provide for a transport allowance and a separation package. Czech Republic, Philippines, Brazil and South Africa similarly provide minimum wage protection for domestic workers. This contrasts with Bangladesh and India, which do not include domestic workers within minimum wage protection.¹⁸⁴ In India, the focus has been on providing social security schemes for workers in the informal sector including domestic workers.¹⁸⁵ Notably, however, it is highly unusual for regulation to include members of the employer's family.¹⁸⁶

Even if coverage is extended, it is crucial to have sufficient inspectors to ensure that minimum wages and other protection are enforced. Thus despite the package of protections of domestic workers in Brazil, statistics show that almost one third of domestic workers receive less than the minimum wage. This is a result of poor law enforcement, insufficient labor inspection and low levels of education among domestic workers.¹⁸⁷ Difficulties of implementation are exacerbated by the nature of domestic work. Since they work in a private household, many domestic workers have no knowledge of their rights; and the close relationship between employer and domestic worker make it difficult to resort to formal means of dispute resolution such as courts. Moreover, inspection visits require access to private homes.

Also problematic is the difficulty in accessing adjudicative machinery. Even if they are aware of their rights, and are able to confront their employers, domestic workers might have to face high legal charges. For migrants, this is particularly problematic, because of the risk to their migration status. South Africa has established an innovative solution with in the form of the Commission for Conciliation Mediation and Arbitration (CCMA). The CCMA establishes a simple, speedy and cheap mechanism for resolving work-place disputes. Employers or employees may refer disputes to the CCMA by filling out a simple referral form. Disputes are then submitted to conciliation where a CCMA commissioner assists the employer and employee to develop their own solution to the dispute in an informal, confidential and lawyer-free environment. If conciliation fails, the CCMA may then arbitrate the dispute, and is empowered to make binding awards. The CCMA replaced the Industrial Court, signifying 'a shift from a highly adversarial model of relations to one based on promoting greater co-operation, industrial peace and social justice.'¹⁸⁸ While the previous dispute resolution processes resulted in only 20

¹⁸² Benjamin, p1595.

¹⁸³ Minimum Wages and Conditions of Employment (Domestic Workers) Order 2010; Statutory Instruments (SI) numbers 1 and 2 of 2011.

¹⁸⁴ ILO Legal survey, para 140.

¹⁸⁵ ILO Legal review, para 96.

¹⁸⁶ ILO Legal review, para 115.

¹⁸⁷ Figures in this paragraph taken from Gomes and Bertolin p.10, citing the Brazilian Institute of Geography and Statistics (IBGE).

¹⁸⁸ CCMA website <http://www.ccma.org.za/Display.asp?L1=31>.

percent of disputes being settled, the CCMA has facilitated a national settlement rate of 70 percent and greater.¹⁸⁹ In its 2010 report, it claims with pride that the rate of settlement is now higher than the rate of awards.¹⁹⁰ In addition, it is much speedier and cheaper than litigating in court.

The CCMA has been particularly successful in its ability to resolve disputes on the part of domestic workers. Macun, Lopes and Benjamin, in their study of CCMA arbitration awards for the years 2003-05, found that ‘while employees in private household (domestic workers) constitute 8.7 percent of the work force (1,087,000) workers, they constitute 12.1 percent of referrals. This amounts to some 10,000 cases being referred to the CCMA annually by domestic workers.’ They conclude that ‘this is indicative of a high level of awareness of employment rights amongst domestic workers.’¹⁹¹ Hertz attributes at least some of this increased awareness to education and outreach efforts on the part of the Commission, aimed at both employers and employees.¹⁹²

As well as direct regulation of domestic workers’ employment position, it is necessary to have public policies directed at improving their education and qualifications. In Brazil, some small initiatives have been taken in this direction. In 2006, a program was developed called ‘Citizen Domestic worker’, which offers education, professional qualification and tips on organizing unions for a small number of domestic workers in seven cities in different states in Brazil. In addition, public campaigns have been mounted on human rights, rights to housing, health, work and social security, and the eradication of domestic child labor. The program was developed in close co-operation with the domestic workers trade union. However, it is tiny in relation to the problem—in 2006 only 210 workers were enrolled out of an estimated 7 million workers in Brazil.¹⁹³

A further crucial element in the protection of domestic workers consists in support for trade unions. A key aspect of the South African scene has been the development of an activist union, in the form of the Domestic Workers and Allied Trade Union. As well as campaigning in SA, the union has been at the forefront of the campaign to achieve a domestic workers convention in the ILO. However, it is notoriously difficult to organize domestic workers. In Brazil, domestic workers’ trade unions have only 1.9 percent membership. Those unions which do exist have difficulty in collecting dues and so are economically vulnerable. These problems are exacerbated by the fact that domestic workers’ trade unions are not registered in Brazil.

Human trafficking

Although perhaps not often considered as part of the problem of discrimination in relation to employment in the informal sector, in fact human trafficking contributes greatly to such problems, and raises complex challenges for legal regulation. In all the countries considered

¹⁸⁹ Ibid.

¹⁹⁰ CCMA Annual Report 2010.

¹⁹¹ I. Macun, D. Lopes and P. Benjamin, “An analysis of Commission for Conciliation Mediation and Arbitration Awards,” *Development Policy Research Unit, Working Paper 08/134* (University of Cape Town, 2008), p.15.

¹⁹² T. Hertz: The effect of minimum wages on the employment and earnings of South Africa’s domestic service Development Policy Research Unit Working Paper 05/99, Oct. 2005.

¹⁹³ Gomes and Bertolin p.22.

here, human trafficking is a serious problem. This is true for Bangladesh,¹⁹⁴ Botswana,¹⁹⁵ Brazil,¹⁹⁶ Czech Republic,¹⁹⁷ India,¹⁹⁸ Nepal,¹⁹⁹ the Philippines,²⁰⁰ South Africa,²⁰¹ and Zambia.²⁰² This is despite the fact that there are statutory and policy measures to prevent trafficking.

One reason for the persistence of trafficking is the failure properly to apprehend and prosecute offenders. But in addition, there has been a failure to address the root causes of trafficking. Thus CEDAW has consistently recommended, not just a more vigorous program of prosecution of offenders, but also a holistic approach, aimed at addressing root causes of trafficking. These include, firstly, measures to improve women's economic situations and to provide them with educational and economic opportunities, thereby reducing their vulnerability to exploitation and traffickers;²⁰³ secondly, increasing efforts at international, regional and bilateral co-operation;²⁰⁴ thirdly collecting data; and fourthly providing support services for victims.

Migrant workers

Also challenging for legal regulation of the informal sector is the situation of migrant workers, particularly women who migrate in search of domestic work. Women migrant workers often become victims of abuse, whether physical or psychological; sexual violence and slavery-like working conditions.²⁰⁵ Undocumented migrant workers are particularly vulnerable.

Some attention has been paid to this problem at international level. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted in 1990, requires States Parties to provide basic human rights to all migrant workers and members of their families without distinction of any kind such as sex, race, color, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status. In particular, it provides that migrant workers 'shall enjoy treatment not less favorable than that which applies to nationals of the State of employment' in respect of remuneration, other conditions of work and other terms of employment. Migrant workers should also be given the right to freedom of association and to join trade unions of their choice. Particularly important is the duty of States to ensure that migrant workers are not deprived of their rights due to irregularities in their stay or employment. This applies especially to employers, who 'shall not be relieved of any legal or contractual obligations, nor shall their obligations be limited in any manner by reason of such irregularity.'

¹⁹⁴ CEDAW concluding observations 2011 (Bangladesh), para 21.

¹⁹⁵ ICCPR concluding observations Botswana 2008, para 16.

¹⁹⁶ CEDAW concluding observations 2007 (Brazil), paras 23-24.

¹⁹⁷ CEDAW concluding observations 2010 (Czech Republic), para 24.

¹⁹⁸ CEDAW concluding observations 2007 and 2010 (India).

¹⁹⁹ CEDAW concluding observations 2011 (Nepal), para 21.

²⁰⁰ CEDAW concluding observations 2006 Philippines, para 19.

²⁰¹ CEDAW concluding observations 2010 (South Africa), para 27.

²⁰² Anti-Human Trafficking Act (2008).

²⁰³ CEDAW concluding observations 2006 Philippines, para 20.

²⁰⁴ CEDAW concluding observations Zambia (2011), para 23-24.

²⁰⁵ CESCR concluding observations 2008 Philippines.

The ILO Domestic Workers' Convention also gives some protection to migrant domestic workers. Article 2 states that the Convention applies to all domestic workers. Some specific provision is also made. Article 9 requires all domestic workers to be entitled to keep their travel and identity documents in their possession. Article 8 is specifically devoted to migrant workers. Its major requirement is that migrant domestic workers who are recruited in one country for work in another should receive a written job offer or contract of employment enforceable in the country in which the work is to be performed prior to crossing national borders. The contract should address all the terms of employment required for local domestic workers. (This does not apply to workers such as those within the EU, who have freedom of movement for the purposes of employment.) Members are required to co-operate with each other to ensure the effective application of the Convention to migrant domestic workers, and should specify the conditions under which such workers are entitled to repatriation on the expiry or termination of their contract of employment.

Both the Philippines and Nepal are the source of large numbers of women who migrate to other countries, primarily as domestic workers. The Filipino Government has made a significant effort to address this phenomenon, for example by providing pre-departure information and support services to overseas Filipino workers if they migrate legally,²⁰⁶ and by means of bilateral agreements and memoranda of understanding on migrant workers' rights with some countries and regions. It has also adopted the Migrant Workers and Overseas Filipinos Act of 1995, and promoted voluntary social security schemes for overseas Filipino workers.²⁰⁷ This contrasts with Nepal, where only very limited initiatives have been taken to provide pre-departure information and skills training and there is no institutional support either in Nepal or in countries of employment.²⁰⁸ In 2007, Nepal adopted the Foreign Employment Act, which aims to 'make foreign employment business safe, managed and decent and protect the rights and interests of the workers who go for foreign employment and the foreign employment entrepreneurs, while promoting that business.'²⁰⁹ Although the Act prohibits gender discrimination in sending workers for foreign employment, it also expressly states that where an employer institution demands either male or female workers, nothing shall prevent sending workers according to that demand.²¹⁰ On the other hand, it does prohibit sending under-18 year olds to foreign employment, as well as requiring institutions which send workers for foreign employment to provide reservations for 'women, Dalits, indigenous nationalities, oppressed classes, backward areas and classes and people of remote areas in the number as prescribed by the Government of Nepal.'²¹¹

The consistent recommendation of CEDAW and other international human rights bodies has been to focus on the root causes of migration, namely persistent high unemployment and underemployment, and to create the conditions necessary for the development of safe and protected jobs for women as a viable economic alternative to migration or unemployment.²¹² In addition, these countries have been urged to improve counseling and medical assistance for

²⁰⁶ CEDAW concluding observations 2006 Philippines, para 7.

²⁰⁷ CESCR concluding observations 2008 Philippines, para 1.

²⁰⁸ CEDAW concluding observations 2011 (Nepal), para 33.

²⁰⁹ Foreign Employment Act 2007 preamble: see <http://www.dofe.gov.np/acts-18-en.html>.

²¹⁰ Foreign Employment Act 2007, s.8.

²¹¹ Foreign Employment Act 2007, ss7 and 9.

²¹² CEDAW concluding observations 2006 Philippines, paras 21-22.

migrant women workers while overseas; to conclude more bilateral agreements with countries of destination and to provide legal and consular assistance to its nationals facing discriminatory treatment. Other recommendations include pre-departure orientation and skill training.

Rural workers

A major part of the informal economy is found in rural areas, where women workers in particular suffer cumulative disadvantage in the labor market, due to the persistence of customs and traditional practices preventing women from inheriting or acquiring property, the difficulties in accessing education, health and social services, and the absence of employment opportunities. For example, in Zambia, the majority of women live in remote and rural areas, where they are particularly disadvantaged.²¹³ Zambia has taken some initiatives, such as the Citizens Economic Empowerment Act, as well as providing for the allocation of 30 percent of titled land to women. Nevertheless, customs and traditional practices continue to prevent women from inheriting or acquiring ownership of land and other property and from accessing financial credit and capital. This is exacerbated by the practice of ‘property grabbing’, whereby the assets of a man who dies intestate are considered to belong to his family rather than to his widow. Although at customary law, the deceased’s family is meant to have responsibility for his wife and children after his death, in modern times, the custom frequently results in eviction of the widow and children from the marital home by members of her deceased husband’s family. Although the Zambian Intestate Succession Act of 1989 gives widows 20 percent of the deceased’s estate, it is not widely applied, and in any event, does not apply to land held under customary title, which constitutes 80 percent of property ownership in Zambia. Property grabbing is therefore widespread: indeed the Director of the Zambian Law Development Commission was reported as stating that 78 percent of widows and orphans in Zambia suffer from the injustices resulting from statutes such as the Intestate Succession Act of 1989.²¹⁴ The Zambian Law Development Commission is therefore calling for reconsideration of this law.

Implementation of equality and anti-discrimination laws

Introduction

The existence of Constitutional equality guarantees and statutory anti-discrimination provisions is only part of the picture. Unless there are proper mechanisms for compliance, even the best legislative structure will have little effect. Such a compliance framework needs several elements:

- 1) *An accessible adjudicative structure*: Courts are generally slow and expensive. If, as is usual in common law systems, they are based on an adversarial structure, they impose a heavy burden on the applicant, who must take the initiative and bear the financial and emotional costs. Absence of legal aid, difficulties in accessing translation services, distance from courts and lack of legal literacy exacerbate these difficulties. In many countries, judges and lawyers are unfamiliar with anti-discrimination legislation. These difficulties can be ameliorated by creating a cheaper and quicker adjudicative system for

²¹³ CEDAW concluding observations 2011 Zambia, para 37.

²¹⁴ Lusaka Times 21 May 2011. <http://www.lusakatimes.com/2011/05/21/toothless-law-review-curb-rising-cases-property-grabbing/>. Accessed 17/01/2012.

labor law or discrimination issues, such as tribunals or dedicated labor or equality courts. In addition, legal aid, broad standing provisions (which allow trade unions, NGOs, human rights commissions or other representative bodies to bring cases), class actions and other similar mechanisms might reduce the burden on the individual.

- 2) *Alternatives to courts*: An alternative or complementary approach is to move away from an adversarial system, and provide for conciliation and arbitration of disputes. A statutory equality or human rights commission might have powers to investigate and determine discrimination cases.
- 3) *Labor inspectorates*: Labor inspectorates place the responsibility on state officials to discover and punish unlawful discrimination. Inspectors are more often used to police other kinds of breaches of labor standards, such as minimum wages and health and safety provisions, but might additionally have a role in relation to discrimination. The remedy is closer to a criminal sanction, with fines placed on perpetrators, rather than a civil sanction, which would give compensation to the victim.
- 4) *An equality or human rights commission* with powers to conduct research, training, investigation and possibly its own sanctions.
- 5) *Mainstreaming*: Mainstreaming refers to a proactive approach which (i) assesses new policies and laws for their impact on discrimination and adjusts them accordingly; (ii) detects and remedies unlawful discrimination without the need for litigation; and (iii) actively pursues equality, for example through training, quotas, reasonable accommodation or structural change.
- 6) *Incentives*: There is increasing use of incentives including contract compliance (procurement policies which link government contracts to observance of equality standards in the workplace), government funding schemes which reward equality of opportunities, tax incentives etc. Some systems are now experimenting with ‘reflexive law’ which aims to bring about organizational change by creating the appropriate regulatory mix of incentives and sanctions and to harness the energies of actors internal to the regulated body.

Access to justice

As the CEDAW committee regularly points out, even if women have rights on the statute book, they are limited in their ability to exercise their rights in practice and to bring cases of discrimination before courts, because of such factors as legal costs, the persistence of traditional justice systems, illiteracy, lack of information about their rights, lack of familiarity among the judiciary of discrimination laws, and other practical difficulties in accessing courts.²¹⁵ In Botswana, this is true both of women and of other poor people, such as members of the San/Basarwa groups and other non-Tswana groups, who experience difficulties accessing courts, due to high fees and absence of legal aid in most cases.²¹⁶ Also highly problematic is the

²¹⁵ See e.g. CEDAW concluding observations (Botswana) 2010, para 17.

²¹⁶ CERD concluding observations (Botswana) 2006, para 14.

difficulty in accessing adequate interpretation services.²¹⁷ Thus CEDAW has urged Botswana to provide legal aid services, implement legal literacy programs and disseminate knowledge of ways to utilize legal remedies for discrimination.²¹⁸ Similarly, CERD has recommended that Botswana provide adequate interpretation services.²¹⁹ Insufficient legal aid is also a point of concern in South Africa,²²⁰ as is the fact that many legal services are only provided in English and Afrikaans, with which many of the most disadvantaged and poor ethnic groups are unfamiliar.²²¹

Similarly, in the Czech Republic, the CEDAW committee reporting in 2010 noted the low number of lawsuits for sex discrimination filed in court. Women prefer out of court settlements, due in part to the financial cost of litigation, and the difficulty in proving incidents of sex discrimination.²²²

Where discrimination provisions entail criminal offences, implementation is dependent on State willingness to prosecute. This is frequently missing. For example, in relation to Brazil, the CERD Committee complained in 2004 that, despite the widespread occurrences of offences under race discrimination legislation, domestic legal provisions against racist crimes are rarely applied. One of the measures it recommends is the institution of training measures to improve the awareness of judges, public prosecutors, lawyers and other law enforcement officers of racist crime.²²³

One way of making remedies more accessible is to set up specialist tribunals, which are specifically constituted to be cheap, quick and procedurally straightforward. For example, in South Africa, Equality Courts have been set up to enforce the Promotion of Equality Act (for non-employment discrimination), while the CCMA has mediation and arbitration functions for labor disputes (see above). In some countries, this function might be performed by the specialist human rights or equality body. For example in India, the five National Commissions (for Women, Minorities, Scheduled Castes, Scheduled Tribes and Human Rights) have powers to investigate breaches of discrimination or human rights, either on their own initiative or as a result of a complaint. They have the powers of civil courts to summon and examine witnesses and documents.²²⁴ However, the CEDAW committee reporting in 2007 was concerned that this did not go far enough. In particular, there was no adequate mechanism to enforce the Domestic Violence Act 2005, and legal services to poor and marginalized women in rural and tribal areas were lacking.²²⁵

In South Africa, customary courts have traditionally played an important role in providing informal dispute resolution to large numbers (estimated at nearly 17 million) of South Africans, who could not otherwise afford courts. These are community-based discussion forums, inclusive

²¹⁷ CERD concluding observations (Botswana) 2006, para 14.

²¹⁸ CEDAW concluding observations Botswana (2010) para 18.

²¹⁹ CERD concluding observations Botswana (2006) para 14.

²²⁰ CEDAW concluding observations (South Africa 2011) para 16.

²²¹ CERD concluding observations South Africa 2009 para 24.

²²² CEDAW concluding observations Czech Republic 2011.

²²³ CERD concluding observations Brazil 2004 para 18.

²²⁴ CERD original report India 2006.

²²⁵ CEDAW concluding observations India 2007 para 18-20.

of the membership of the community, rather than adversarial courts with presiding officers. However, they are also flawed in several ways, not least because they are under-resourced and are open to corruption and abuse.²²⁶ Women's groups have argued that the composition of traditional courts and their patriarchal character render women particularly vulnerable. There are many places where women are not allowed to appear before customary courts, but must be represented by a male relative.

Particularly controversial are current proposals to reform customary courts in South Africa. If the Traditional Courts Bill becomes law, it would give formal power to the traditional leaders to act as presiding officers over courts with civil and criminal jurisdiction. There are several ways in which these provisions prejudice women: although divorce and separation, custody and guardianship, will and property are excluded from the jurisdiction of the proposed traditional courts, the Bill permits them to adjudicate over domestic violence and other sorts of violence. Lawyers are not permitted. The amended Bill does state that a party may be represented by his or her wife or husband 'in accordance with customary law and custom.' However, as Mnisi Weeks points out, it is unheard of for wives to represent husbands in customary courts, and in most customary law, women must be represented by male relatives. Particularly problematically, if the Bill is passed, women will no longer be able to choose to use ordinary courts instead of customary courts. It is for this reason that CEDAW, reporting in 2011, expressed concern that the Traditional Courts Bill might jeopardize women's access to justice.²²⁷ The traditional hostility of customary to LGBT people means that they too would be particularly vulnerable if the bill becomes law.

Kenya, as part of its new constitutional settlement, has extended competence for hearing racism cases from the High Court to include lower courts. It has also piloted a legal aid scheme which it hopes to extend more widely. Nevertheless, CERD, reporting in 2011 recommended that further measures be taken, including the use of paralegal in the rural and arid and semi-arid areas of the country. In addition, judicial procedures needed to be speeded up.²²⁸

Labor inspectorates

Labor inspectors are most often used for the enforcement of minimum wages. Their effectiveness is heavily dependent on the resources at their disposal. For example, the CECR in 2008 noted with concern the minimum wages in the Philippines were not being enforced, largely due to a shortage of labor inspectors. This was true too for health and safety, where inspections of workplaces were infrequent and ineffective.²²⁹

Equality or human rights commissions

The need for an independent institution to monitor and promote human rights, including the prevention of discrimination, is widely recognized. The 'Paris Principles', adopted by the

²²⁶ The account of customary courts is taken from Sindiswe Mnisi Weeks 'The Traditional Courts Bill' SA Crime Quarterly No. 35 March 2011 pp 3 ff.

²²⁷ CEDAW concluding observations 2011, para 16.

²²⁸ CERD concluding observations Kenya 2011, para 10.

²²⁹ CECR concluding observations Philippines (2008).

General Assembly in 1993 (General Assembly Resolution 48/134),²³⁰ requires a national body to be vested with competence to promote and protect human rights. This institution should have a broad mandate, including drawing the government's attention to human rights violations and proposing solutions; promoting and ensuring the harmonization of national law with international human rights obligations; encouraging ratification of human rights instruments; contributing to periodic reports of the State to UN bodies and committees; contributing to human rights education; and with powers to combat all forms of discrimination, particularly through information, education and the press.

Several countries have no such institution. Thus although Botswana established an Ombudsman in 1995, it has been repeatedly urged by the CERD, ICCPR and CEDAW committees to establish an independent, properly resourced national human rights institution fulfilling the requirements of the Paris Principles.²³¹ In its report on Jamaica in 2011, the ICCPR, while welcoming the establishment of the Office of the Public Defender, was concerned that Jamaica had not yet established an independent national human rights institution in accordance with the Paris Principles.²³²

Where a national institution does exist, it may be limited in scope and lack sufficient resources or authority. Thus the CESCR commented in 2008 that although the Philippines had established a Commission on Human Rights of the Philippines, its mandate did not include the protection and promotion of economic, social and cultural rights. It was also concerned at the lack of adequate financial resources available to the Commission for the implementation of its investigative and monitoring functions.²³³ Similarly, the CEDAW committee reported in 2011 that although the Human Rights Commission of Zambia had established a Gender Equality Committee, both the Commission and the Committee had inadequate human, financial and technical resources. It recommended that the Commission be strengthened by providing visibility, power, and human and financial resources at all levels.²³⁴ In Nepal, CEDAW reported in 2011 that draft legislation provides for a National Human Rights Commission, but that it was not fully in compliance with the Paris principles.²³⁵ The South African Human Rights Commission, by contrast, was commended by CERD in 2009 for its active role in eliminating residual effects of racial discrimination.²³⁶

Some countries have established specialized institutions for discrimination law. For example, in relation to Brazil, the CERD committee reporting in 2004 noted the establishment in 2001 of the National Council for Combating Discrimination, which became the National Council for the Promotion of Racial Equality in 2004.²³⁷ There is also a Special Secretariat for the Promotion of Race Equality and a Special Secretariat of Policies of Women. However, CEDAW, reporting in 2007, was concerned at the fragile nature and capacity of the gender equality mechanisms

²³⁰ General Assembly Resolution 48/134.

²³¹ CERD concluding observations Botswana 2006, para 21; ICCPR 2008, para 8; CEDAW concluding observations Botswana 2010, para 17.

²³² ICCPR concluding observations Jamaica 2011 para 5.

²³³ CESCR Committee 2008.

²³⁴ CEDAW concluding observations Zambia 2011, para 15-16.

²³⁵ CEDAW concluding observations Nepal 2011, para 45.

²³⁶ CERD concluding observations 2009, para 8.

²³⁷ CERD concluding observations 2004 Brazil, para 7.

established in some states and municipalities. It was also concerned that the human and financial resources of the Special Secretariat of Policies for Women may not be commensurate with its mandate.²³⁸ Kenya has stated its intention to restructure its National Human Rights and Equality Commission into two separate commissions, a Human Rights Commission and a Gender Equality and Development Commission. However CEDAW reporting in 2011 was concerned at the difficulty of coordinating the work of these two bodies, as well as the insufficient resources generally of the national machinery for the advancement of women.²³⁹ CERD took the view that the positive experience of the Kenya commission should be reinforced when considering new institutional arrangements.²⁴⁰

India too has established specific bodies in relation to different aspects of discrimination. These include the National Commission for Women, the National Commission for Minorities, the National Commission for Scheduled Castes, National Commission for Scheduled Tribes and a National Commission for Human Rights. According to India's report to CERD in 2006, these commissions are responsible for safeguarding the rights guaranteed to specified target groups under the Constitution as well as under the various laws passed by the legislature. These commissions have the power to investigate violations of rights, either on their own initiative, or as a result of specific complaints. They have the powers of civil courts to summon and examine witnesses and documents. Their reports have to be tabled in Parliament for discussion.²⁴¹

EU law now requires EU member states to create an equality body in relation to race discrimination. In the Czech Republic, the Ombudsman began functioning as the Equality Body to meet its EU obligations. Nevertheless, the CERD committee reporting in 2011 was concerned by the absence of an independent national human rights institution which was fully compliant with the Paris Principles.²⁴² CEDAW was similarly concerned that the Ombudsman had limited powers.²⁴³

Mainstreaming

The aim of mainstreaming is to inject equality concerns into all processes of decision-making, whether at the level of the State or the employer. Instead of a reactive approach, which responds only to complaints by individuals through the adjudicative process, mainstreaming is a proactive approach, which (i) assesses new policies and laws for their impact on discrimination and adjusts them accordingly; (ii) detects and remedies unlawful discrimination without the need for litigation; and (iii) actively pursues equality, for example through training, quotas, reasonable accommodation or structural change. Mainstreaming also requires effective monitoring provisions, which include the collecting of data in order to assess the impact of mainstreaming policies and programs and the setting of timetables and targets. Particularly importantly, mainstreaming requires involvement with stakeholders, including trade unions, employers' associations, NGOs and other civil society organizations, and affected individuals and employers.

²³⁸ CEDAW concluding observations Brazil 2007, para 17.

²³⁹ CEDAW concluding observations Kenya 2011, para 15.

²⁴⁰ CERD concluding observations Kenya 2011, para 11.

²⁴¹ CERD original report India 2006, para 10.

²⁴² CERD concluding observations Czech Republic 2011, para 9.

²⁴³ CEDAW concluding observations Czech Republic 2010, para 11.

Mainstreaming is crucially dependent on political will and institutional structures. Responsibility for co-ordination should be assigned to a governmental department with authority and resources, and each department should have its own focal point for responsibility for carrying through mainstreaming policies within their own work. It is also important to ensure that such machinery is instituted at regional and local level, while at the same time giving strong coordinating powers to the central department.

Several countries have expressly instituted mainstreaming policies. These include Botswana, Nepal, the Philippines, and South Africa. However, mainstreaming is heavily dependent on political will, resourcing and appropriate institutions. For example, the ILO commented in 2010 that the Botswana Government had adopted a gender mainstreaming strategy to ensure that a gender perspective is included in all policies and programs; gender audits have been carried in a number of ministries, including the Ministry of Labor and Home Affairs. The Department of Women's Affairs had continued its awareness-raising activities on gender equality issues.²⁴⁴ However, the CEDAW committee, also reporting in 2010, noted with concern that the Women's Affairs Department, located within the Ministry of Labor and Home Affairs, was severely under-resourced and understaffed and did not have the authority or capacity to support gender mainstreaming across all sectors and levels of Government. The CEDAW committee was also concerned at the lack of political will to develop the necessary institutional capacity of for national machinery for the practical realization of equality between men and women.²⁴⁵ As well as calling on the Botswana government to give the necessary authority, decision-making power and human and financial resources to such national machinery, the Committee recommended that it institute a system of focal points in all sectoral ministries with sufficient expertise in gender equality issues to ensure that these issues were fully mainstreamed into all policies and programs.²⁴⁶

CEDAW made the same comment in 2006 in relation to the Philippines. Although it recognized the efforts of the Philippine government to integrate a gender perspective into all fields, and to collect statistical data, it remained concerned that the National Commission on the role of Filipino women lacked the necessary institutional authority, capacity and resources to effectively support gender mainstreaming.²⁴⁷ It recommended better resourcing as well as a more proactive approach. A similar pattern emerges in relation to Nepal. CEDAW reporting in 2011 welcomed the gender mainstreaming role of the Ministry of Women, Children and Social Welfare. But it was concerned at the limited short-term progress on women's rights.²⁴⁸ As well as calling on the Nepalese government to strengthen national machinery for the empowerment of women at both local and national levels, it recommended the strengthening of the monitoring mechanisms and to develop a comprehensive gender indicator system. In South Africa too, the CEDAW committee was concerned at the weak institutional capacity of the Ministry for Women, Children and People with disabilities, which could prevent it from ensuring comprehensive gender mainstreaming.²⁴⁹

²⁴⁴ ILO CEACR Individual Observation Convention 111 Botswana (2010).

²⁴⁵ CEDAW concluding observations Botswana 2010, para 19.

²⁴⁶ CEDAW concluding observations Botswana 2010, para 20.

²⁴⁷ CEDAW concluding observations Philippines 2016, para 12.

²⁴⁸ CEDAW concluding observations Nepal 2011, para 13.

²⁴⁹ CEDAW concluding observations South Africa 2011, para 18.

The location of specialized units within government is also of importance. For example, the CEDAW committee reporting on Zambia in 2011 welcomed the establishment of the Office of the Minister of Gender and Women in Development in the Cabinet Office, and the allocation of additional resources to it, but was concerned about the adequacy and sustainability of these resources.²⁵⁰ Similarly, the CEDAW committee reporting in 2010 commented in relation to the Czech Republic that the position of Minister for Human Rights and National Minorities had been discontinued, and responsibility for gender equality had been reconsigned to a Gender Equality Unit responsible to the Government Commissioner for Human Rights, who was not a Cabinet member. This may have weakened the Czech Republic's institutional machinery for the advancement of women. The Gender Equality Unit has only a weak inspection mandate, and gender focal points within different Ministries were assigned to junior level and part-time officials with limited power.²⁵¹

Monitoring is also difficult to achieve. Governments, such as the South African and Nigerian governments, have expressed concerns that identification of its population by ethnicity or religion may lead to national disunity,²⁵² and other countries find the collection of statistics both sensitive and expensive. India too has refused to supply statistics to CERD on the grounds that caste is not race.

Quotas, affirmative action and 'Temporary special measures'

Express preferences for disadvantaged groups in the form of quotas, affirmative action or temporary special measures (called affirmative action from here on) have always been controversial, because they appear to breach the principle of equal treatment on grounds of gender, race etc. However, it is increasingly accepted that, although they may appear to breach the principle of equal treatment, such measures in fact advance substantive equality by reversing the disadvantage experienced by groups historically subjected to discrimination.²⁵³ Thus while CEDAW expressly refers to 'temporary special measures', its General Recommendation No. 25 makes it clear that such measures are part of a necessary strategy to accelerate the achievement of substantive equality for women. The same is true for CERD.²⁵⁴ CEDAW recommends not just the enactment of legislation, but also the setting of time-bound targets; the allocation of sufficient resources for the implementation of strategies such as outreach and support programs; and the creation of incentives, quotas and other proactive measures. It also recommends the raising of awareness among members of Parliament, Government officials with decision-making power, employers and the general public about the necessity of temporary special measures.²⁵⁵

Because affirmative action is potentially a breach of the equality principle, it is generally necessary to have an express legal mandate to permit such measures. For example, the Kenyan Employment specifically states that it is not discrimination to take 'affirmative action measures

²⁵⁰ CEDAW concluding observations Zambia 2011, para 15.

²⁵¹ CEDAW concluding observations Czech republic 2010, para 11.

²⁵² CERD concluding observations South Africa 2009 para 11; CERD concluding observations Nigeria 2005.

²⁵³ For a more detailed explanation see Fredman, *Discrimination Law* above note 8 chap. 5.

²⁵⁴ CERD Article 2(2).

²⁵⁵ See e.g. CEDAW concluding observations Zambia 2011, para 18.

consistent with the promotion of equality or the elimination of discrimination in the workforce.²⁵⁶

Some countries, such as Botswana²⁵⁷ and Zambia,²⁵⁸ do not have any provision for affirmative action. In the EU, the legality of affirmative action provisions is tightly controlled. Only if candidates are of equal merit is affirmative action potentially lawful and even then, a ‘savings’ clause is necessary to permit individual consideration. Even within these confines, however, the Czech Republic has not instituted special measures.²⁵⁹

Other countries have adopted special measures in some areas but not others. Thus in Nepal, measures have been instituted to ensure the presence of 33 percent of women in the Constituent Assembly, and special gender-inclusive measures have been established in the recruitment process in public service. In addition, economic empowerment measures and measures increasing women’s access to land have been adopted. Nevertheless, CEDAW reporting in 2011 was concerned that such measures were not systematically applied to address the whole range of women’s disadvantage. In particular, special measures were not addressed to women facing multiple forms of discrimination; and special measures were not systematically addressed to discrimination in the judiciary and Government administration, and in access to health, education, employment, housing and land ownership.²⁶⁰

A particularly wide-ranging set of affirmative action measures has been instituted by Brazil. A National Affirmative Action Program was established by a decree issued in 2002²⁶¹ ‘to actively promote the principles of diversity and pluralism in the filling of posts in the federal public administration and the contracting of services by government agencies.’ It sets goals for the achievement of a specified proportion of participation by all segments, Afro-descendants, women and the disabled.²⁶² For example, affirmative action programs instituted in the Ministry of Agricultural Development required a minimum of 20 percent of the executive posts in the Ministry and in the National Settlement and Agrarian Reform Institute (INCRA) to be filled by Afro-descendants by the end of 2002, rising to 30 percent in 2003. In addition, 30 percent of the Agricultural Development Ministry’s budget for agrarian reform programs had to be channeled to predominantly black rural communities. Similar targets were set by the Ministry of Justice and the State Secretariat for Human Rights for executive and advisory posts, as well as for the contracting of outsourced services (Afro-descendants, 20 percent; women, 20 percent; the disabled, 5 percent). Scholarships in diplomatic studies were also awarded to Afro-descendants, to prepare for admission to a diplomatic career. The Brazilian Federal Government also instituted a National Human Rights Programme in 2002 to overcome racist and exclusionary practices against segments of society which suffer from discrimination.²⁶³

²⁵⁶ Kenyan Employment Act s.5(3)(a).

²⁵⁷ CEDAW concluding observations Botswana 2010, para 21-22.

²⁵⁸ CEDAW concluding observations Zambia 2011, para 17.

²⁵⁹ CEDAW concluding observations 2010 Czech Republic, para 18.

²⁶⁰ CEDAW concluding observations Nepal 2011, para 15.

²⁶¹ Decree No. 4228 of 13 May 2002.

²⁶² CERD Original report of Brazil 2004, para 17.

²⁶³ CERD Original report of Brazil 2004, para 17.

The Brazilian government, reporting in 2004, also mentioned the progressive application of affirmative action policies relating to preferential investments in the areas of education, health, housing, sanitation, and potable water in regions occupied primarily by Afro-descendants; the channeling of public resources into scholarship programs for black students; sustainable development projects in runaway slave communities; projects for the preparation of black leaders; exchange programs with African countries and projects designed to allow institutions in different regions to share their experiences.²⁶⁴

However, the impact of these programs remains unclear. CEDAW reporting in 2007 was concerned that the law establishing a quota system for women²⁶⁵ had proved to be inefficient and had little if any impact on women's participation in political life. Women were still significantly underrepresented at all levels and instances of political decision-making, including in elected bodies, at the highest levels of the judiciary, and in diplomacy.²⁶⁶

The strongest and deepest tradition of affirmative action is that of India. The Constitution itself mandates the State to make provision for the reservation of posts in government jobs and higher education in favor of disadvantaged groups (primarily Dalits or 'untouchables') identified as Scheduled Castes and Scheduled Tribes.²⁶⁷ In addition, affirmative measures are increasingly taken for other disadvantaged groups, known as 'Other socially and educationally backward classes (OBCs)'.

Also highly developed are the affirmative action provisions in South Africa. The South African Constitution, like the Indian, expressly permits affirmative action, regarding it as a means to achieve equality, rather than a breach or derogation. In order to address the long-term consequences of the apartheid policy of 'job reservation', whereby all skilled jobs were reserved for whites, the new democratic government took the view that positive measures were needed. The Employment Equity Act of 1998 therefore required designated employers to 'implement affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce.'²⁶⁸ Designated groups include black people (a generic term which means groups classified by apartheid as Africans, Coloreds and Indians), women and people with disabilities. The Act prescribes clear steps to be taken by employers. As a start, having consulted with employees and representative trade unions, employers should undertake an audit of the workplace to identify under-representation and barriers to the employment or advancement of designated groups. On the basis of this information, the employer should prepare an employment equity plan setting numerical targets and designing measures to identify and eliminate discriminatory barriers and promote workplace diversity. A clear timetable should be identified. Progress reports on the implementation of the plan must be reported periodically to the Department of Labor, on the basis of which the Commission for Employment Equity compiles annual reports on progress. The Department of Labor can send inspectors to visit designated sites to check whether the situation on site reflects reports filed. Sanctions for non-compliance include fines.

²⁶⁴ CERD Original report of Brazil 2004, para 360.

²⁶⁵ Law No. 9504 of 30 September 1997.

²⁶⁶ CEDAW concluding observations Brazil 2011, para 25.

²⁶⁷ Indian Constitution Articles 16(4) and 16(4A).

²⁶⁸ South African Employment Equity Act 1998 s.2(b).

In addition to the employment equity provisions, the South African government has embarked on a program of advancing the economic empowerment of black South Africans through requiring, not just affirmative action in employment, but also the transfer of capital, such as shares in corporations, to historically disadvantaged South Africans (HDSAs), including black women, workers, youth, people with disabilities and people living in rural areas. Under the Broad-based Economic Empowerment Act 53 of 2003, incentives in the form of government procurement, public-private partnerships, sales of state-owned enterprises, licenses, and other incentives are used to encourage corporations and others to transform their enterprises. To assess a company's rating, a scorecard is used, based on three components: (i) direct empowerment through ownership (transfer of equity) and control (increasing the numbers of HDSAs in executive management and board committees; (ii) human resource development through employment equity and skills development; and (iii) indirect empowerment such as preferential treatment of black enterprises through procurement, enterprise development, profit and contract sharing etc; and contribution to socio-economic development of designated groups. Specific weightings are given to each of these factors.

CEDAW, reporting in 2011, noted with satisfaction that the South African Government, having adopted the Strategic Framework on women's Empowerment and Gender Equality within the Public Service, had exceeded the 50 percent target for representation of women at all levels of senior management in the public service. However, Burger and Jafta, having investigated the effect of affirmative action policies in South Africa from 1998-2006, concluded that their effect in reducing employment or wage gaps had been 'marginal at best', and were much less significant in bringing about changes in labor market outcomes than improved access to education for Africans, the remaining educational quality differential and the employment effects of accelerated economic growth. They do find a small narrowing of the unexplained component at the very top of the wage distribution, which suggests that affirmative action might have assisted individuals who were already higher up on the skills ladder, but not the average previously disadvantaged individual.²⁶⁹

²⁶⁹ Burger and Jafta, 2010. "Affirmative Action in the South Africa: An Empirical Assessment of the impact on labor market outcomes" *Crisis Working Paper* 76.