# The Role of Equality and Non-Discrimination Laws in Women’s Economic Participation, Formal and Informal

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

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**Executive Summary**

**(i) Background and context**

The conceptual framework used in this research is designed to capture the many and interlocking inequalities facing women in relation to economic and social rights. Moreover, an important dimension of the project is to recognise and address the ways in which other sources of inequality adversely affect women’s economic and social opportunities.

Women’s social and economic situation is dependent on a range of interlocking factors, which need to be understood in a holistic manner. Thus women’s disadvantage in the waged labour force reflects not just prejudice in the workforce itself, but also their unequal access to power and resources more generally, whether in the family, in education, in access to property, or personal security. In many countries, women are subject to laws which discriminate against them in relation to property or land ownership, succession, and family law, and these laws undermine women’s economic opportunity, welfare and autonomy. Further structural barriers to women’s access to social and economic rights include: women’s responsibilities for child-caring and the elderly; women’s unpaid work in the home and in family concerns; the undervaluation of women’s work; lack of access to credit or social security; lack of appropriate education or training, violence against women in the public space, the workplace and in the home; and stereotypes which are prejudicial to women.

Legal intervention, to be effective, should be capable of addressing the interaction between these factors. Discrimination law often focuses on the paid labour force. This is an important aspect of the inquiry. But the challenge is also to find means to address inequalities and disadvantage in the great variety of productive occupations and activities engaged in by women, ranging from formal employment, to informal employment, micro-entrepreneurship, family employment, subsistence and farming work, home-working, domestic work, voluntary work and others.

In order to provide background material for such a cross-cutting analysis, this background paper provides a review of equality and anti-discrimination laws and best practice in a selection of lower and middle income countries across a range of social and economic issues, with the aim of providing background material for such a cross-cutting analysis. Among low income countries, it 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.

**Constitutional protections for gender equality in social and economic life**

**1. De Jure Equality**

All the countries have a constitutional equality guarantee, generally providing for equality before the law, and in some cases specifying that there should be no discrimination on grounds, inter alia of sex. In some cases, this expressly guarantees gender equality in social and economic or in working life.[[2]](#footnote-2)

However, such guarantees do not guarantee that formal equality has been achieved for women. In some countries, exemptions from the constitutional equality guarantee are provided for personal or customary law, with the result that it remains legal to discriminate against in relation to marriage, divorce, marital property ownership and succession. This is true for Botswana, Zambia and India. In other countries, discriminatory laws and practices persist despite constitutional guarantees. This is true for the Philippines, Nepal, Kenya and Nigeria. These provisions substantially impede women’s ability to participate equally in social and economic life. 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, training, career progression or solidarity at work. Without secure rights to education, property, social security or contract, labour market participation is severely compromised: where workers can access jobs at all, they are likely to be precarious or on poor terms and conditions.

Nevertheless, some examples of good practice were found. In South Africa, 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.[[3]](#footnote-3) In Kenya, the new Constitution passed on 2010 provides that any law - including customary law - that is inconsistent with the Constitution is void.[[4]](#footnote-4) In an important new case in Botswana, the Court of Appeal held that discriminatory customary laws of succession might be in breach of the Botswana constitution. The new Zambian draft constitution declares that all laws, customary or regulatory that permit or have the effect of discriminating against women are void. 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.[[5]](#footnote-5) 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. It should be stressed, however, that change in the law has not necessarily brought change in the practices.

**Violence against women**

In many situations, women are excluded from the most fundamental legal protection, namely the right to physical security and protection against violence, whether by husbands, employers, peers or the State itself. Poverty and violence interact in a vicious cycle. Women facing sexual harassment at work, violence at home or violence on the streets, are unlikely to be able to participate on equal terms in the paid labour market. Poverty also forces women to carry out daily economic 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. Women who lack sufficient economic resources may have to engage in transactional sex, exposing them to heightened levels of violence.

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.[[6]](#footnote-6)

There are some examples of good practice: several countries with serious problems of violence against women have recently passed legislation relating to domestic violence, rape, sexual harassment at work and other violence. These include the Philippines, Nepal, Bangladesh, Zambia and Brazil. Nevertheless, patterns of violence continue, demonstrating that 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.

**Anti-Discrimination legislation**

Even where de jure discrimination has been abolished, women continue to display high rates of disadvantage in the labour 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 labour force because their income is essential for family survival, but their responsibilities at home are undiminished.[[7]](#footnote-7) 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 labour 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.[[8]](#footnote-8)

To address these issues, statutory anti-discrimination laws have been enacted in various countries. These are evaluated briefly below.

**(i) Scope:**

In some jurisdictions, there is still no legislative prohibition of discrimination on grounds of sex. This includes India, Nepal and Bangladesh. In other jurisdictions, coverage is confined to employment. For example, although Kenya has a strong constitutional equality provision binding public and private parties, and specific legislation in relation to disability discrimination and race, it lacks a statutory prohibition of discrimination on grounds of gender outside of the employment context. There are, however, some examples of best practice. South Africa has two major pieces of legislation, one covering employment and the other covering all non-employment issues.

**(ii) Grounds:**

Constitutional equality guarantees invariably cover sex, together with other grounds. However, it is only the most recent that expressly include pregnancy. These include the South African and Kenyan constitutions. Following the EU jurisprudence, in the Czech Republic, discrimination on grounds of pregnancy and maternity is considered discrimination on grounds of sex.

A further question concerns the possibility of making claims for intersectional discrimination. This is not well developed in any of the jurisdictions. For example, in India, the Court has made it clear that claims based on gender plus other grounds will not be considered unlawful discrimination under the Indian Constitution.

**(iii) Definition of discrimination:**

There are various ways of defining discrimination in law. The basic conception is the equal treatment principle. If A is treated less favourably than B because she is a woman, then she has been subjected to unlawful discrimination. This is often called direct discrimination, or disparate treatment discrimination. However the equal treatment principle is limited in several ways. An apparently neutral criterion, such as the requirement of full-time working, might be applied equally to both men and women, but women might find it significantly more difficult than men to comply, with the result that the far fewer women than men are able to take advantage of this opportunity. Thus equal treatment might lead to unequal results. To address this situation, the concept of indirect or disparate impact discrimination has been developed. According to this conception, equal treatment will be held to be discriminatory if it has a disproportionate effect on women (or men) unless it can be justified as necessary for the proper execution of the job in hand.

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. However, there are good examples of highly developed statutory definitions of discrimination in some countries. The Czech Republic, which is bound by EU law, has detailed provision for both direct and indirect discrimination. Kenya’s Employment act 2007 prohibits both direct and indirect discrimination, but indirect discrimination is not defined directly. By contrast, the Kenyan National Cohesion and Integration 2007 has a detailed definition of indirect discrimination on the grounds of race, which largely mirrors that of the EU.

**(iv) 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 favourably 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 not been introduced in some jurisdictions (Zambia and Nepal) and only partially in others. For example, in Botswana, it is only an offence in relation to public employment.[[9]](#footnote-9) On the other hand, there several examples of good practice. The Czech Republic includes a provision on sexual harassment.[[10]](#footnote-10) Based on a transposition of EU law, the Czech legislation defines sexual harassment as conduct which has the purpose or effect of violating the dignity of a person. The Kenyan Employment Act 2007 is prohibits both ‘quid pro quo’ harassment and harassment resulting from a hostile environment.[[11]](#footnote-11) However, only employers of more than 20 employees must adopt and implement a policy statement on sexual harassment. Most recently, in India, the Sexual Harassment of Women at Workplace Act 2013 became law in April 2013, giving statutory force to a 1997 decision of the Indian Supreme Court.[[12]](#footnote-12) However, unlike other similar statutes, which give a remedy to a judicial tribunal, enforcement of this statute depends on the creation by the employer of Internal Complaints Committees. Where the complaint is against the employer, or the employment has fewer than 10 employees, the government must set up a local complaints committee at district level.

**Positive Duties to Promote Equality**

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.[[13]](#footnote-13) The Kenyan Employment Act 2007 places a duty on the Minister, labour officers and employers to promote equality of opportunity in employment in order to eliminate discrimination in any employment policy or practice.[[14]](#footnote-14) 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. Recent EU law imposes on 28 member states, including the Czech Republic, a positive duty to encourage public and private actors to ‘take effective measures to prevent all forms of discrimination on grounds of sex in access to employment, vocational training and promotion.’[[15]](#footnote-15)

**Quotas, affirmative action and Temporary Special Measures.**

Some countries, such as Botswana[[16]](#footnote-16) and Zambia,[[17]](#footnote-17) do not have any provision for affirmative action. Others have an express legal mandate to permit such measures. For example, the Kenyan Employment Act specifically states that it is not discrimination to take ‘affirmative action measures consistent with the promotion of equality or the elimination of discrimination in the workforce.’[[18]](#footnote-18) 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.[[19]](#footnote-19)

On the other hand, there several examples of good practice. A particularly wide-ranging set of affirmative action measures has been instituted by Brazil. It sets goals for the achievement of a specified proportion of participation by all segments, Afro-descendants, women and the disabled.[[20]](#footnote-20) 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. The Employment Equity Act of 1998 therefore requires 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.’[[21]](#footnote-21) Designated groups include black people (a generic term which means groups classified by apartheid as Africans, Coloureds and Indians), women and people with disabilities.

**Protective Legislation**

In effect protective legislation, such as night bans or prohibitions against working in hazardous occupations, excludes women from accessing certain type of jobs. Rather than excluding women from valuable opportunities the focus needs to be on improving working conditions and protecting women from violence associated with working at night.

**Who is a worker?**

Legislative benefits, entitlements and protections often only apply to ‘workers’. Great care needs to be spent on the definition of worker to ensure that new and emerging employment relationships are covered.

If the statutory scheme restricts ‘workers’ to the traditional employment relationship model, the employer has as incentive to sidestep the legislation by re-characterising the work relationship as falling outside of the standard model. This can be done through ‘sham’ contracts, which make dependent employees appear to be independent contractors; through casualization of employment; through outsourcing or the use of agency workers and other similar means.

Under **Brazil’s** employment laws, a person is presumed to be an employee unless proven to be an independent contractor. Moreover, the Brazilian authorities do not look at the contractual documents, but at the actual factual circumstances of the employment relationship. The Brazilian Labour Code extends protection to contingent workers and ensures they receive the same salary as regular employees. South Africa has a similar presumption.

**Who is an employer?**

One of the most problematic aspects of the modern flexible workforce, both in developed and developing countries is the need to determine who should be responsible for providing employment benefits.

Legislation often excludes employers from the obligation to ensure equal pay. In **South Korea**, businesses with fewer than five workers or workplaces consisting of blood relatives are not required to ensure equal pay. **Ontario** draws a distinction between public and private sectors. All public sectors employers are obligated to ensure equal pay, while only private sectors employers with 10 or more employees have a similar obligation.

**The Informal Sector**

In contrast to the formal employment market, the informal sector is not always recognized, recorded, protected or regulated by public authorities. Informal workers include casual and seasonal workers, part-time workers, temporary and agency workers, home-workers, domestic workers, and unpaid family workers.

There is a global shift towards flexibility in the labour market. Employers are favouring non-standard employment relationships to cut labour costs and avoid regulation. Workers in the informal economy are low paid, have no job security, social protection and less access to education and training. A large percentage of women are employed in the informal labour sector.

One of the biggest challenges for labour law in general and discrimination law in particular is to find means of extending protection against discrimination to the informal sector. For example, how can the standard definition of the employment relationship be modified to cover new non-standard relationships such that employers are not incentivised to disguise a worker’s true legal status?

In **South Africa**, the legislation presumes that 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 organisation, 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.[[22]](#footnote-22) This approach has been influential in other countries such as **Tanzania**. However, this is not a perfect solution as these presumptions can be rebutted.

**Part Time, Temporary and Agency Workers**

Several jurisdictions have begun to deal with these problems by giving non-regular workers the rights to the same pay and conditions as permanent workers.

**EU** legislation provides that the basic working and employment conditions of agency workers must be at least those that would apply if they had been recruited directly by the end user to do the same job.[[23]](#footnote-23)

**South** **Korean** legislation expressly prohibits unfavourable treatment in relation to pay and other conditions against fixed term workers. [[24]](#footnote-24)

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

South Africa has taken steps to regulate agency workers to ensure that the employee does not fall into the legal gap between the agency nor the client end-user The law deems the worker to be an employer of the temporary employment service. Both the service and the end user are liable for any breach of the provisions of the Basic Conditions of Employment Act. The client can be liable for any unfair discrimination.[[25]](#footnote-25)

**Domestic Workers**

As the number of women participating in the formal labour market increases, corresponding to an increase in the privatisation of public services, many women have delegated child-care and housework to other women. These domestic workers are often migrants from the global South and are highly vulnerable to loss of autonomy, privacy and sexual harassment. Domestic workers raises complicated questions of employment relationships layered on top of issues of both racial and gender discrimination. It is in the context of widespread invisibility and devaluation of domestic work that the ILO passed the Convention on decent work for domestic workers.

**Brazil** has taken steps to address the situation of domestic workers. The Constitution provides rights to minimum wages, paid weekly leave and vacation, paid paternity and maternity leave, notice of dismissal, pension, as well as integration into the social security system.[[26]](#footnote-26)

The most comprehensive regime for protecting domestic workers is from **South Africa**. The Domestic Worker Sectoral Determination, 2002 provides for overtime pay, prohibits payment in kind, regulates maximum hours of work and guarantees breaks between shifts and mealtime breaks.

It is crucial to have inspectors and enforcement mechanisms to ensure these protections are actually enjoyed by domestic workers. Implementation is a challenge because the place of employment is within the employer’s private home. Inspection visits necessarily entail access to private homes. Domestic workers may be afraid to access formal enforcement mechanisms because of their migration status. Moreover, the close relationship between domestic worker and employer makes it difficult for the domestic worker to resort to courts.

In response to these factors, **South Africa** has developed the Commission for Conciliation Mediation and Arbitration (CCMA). Employers or employees may refer disputes to the CCMA by filling out a simple referral form. A commissioner assists both parties to develop their own solution to the dispute in an informal, confidential and lawyer-free environment.

**Migrant Workers**

Migrant workers are vulnerable to physical and psychological abuse, sexual violence and slavery-like working conditions. The **Filipino** Government has made a significant effort to address these issues, for example by providing pre-departure information and support services to overseas Filipino workers if they migrate legally.[[27]](#footnote-27)

**Rural Workers**

Rural women workers are disadvantaged due to persistent customs and traditional practices that prevent women from inheriting and own property. **Zambia** has taken the initiative by providing for the allocation of 30 percent of titled land to women.[[28]](#footnote-28)

**Implementation**

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

1. Inspection combined with criminal penalties is heavily dependent on the resources the State applies to inspectors, and it is not clear that fines produce changed behaviour.
2. Individual complaints to tribunals or independent commissions have the advantage of giving individuals the opportunity to complain in their own right. However, this can constitute a heavy burden on individuals, depending on how costly the court or tribunal process is and how exposed they are to victimization.
3. Mainstreaming is a proactive approach to ensuring equality is a factor in all decision making. However, it depends on political will and institutional structures which may not be in place. It can be difficult to evaluate and requires effective monitoring processes and the collection of disaggregated data
4. Affirmative action and temporary special measures can accelerate achieving de facto equality, it is generally necessary to express legal mandate to permit such measures, the impact of these programs remain unclear.

**BACKGROUND PAPER:**

**Introduction**

This background paper provides a review of laws and best practice in several key areas of economic and social life for women in a selection of lower and middle income countries. It draws directly on work for the World Bank Development Report 2013 on anti-discrimination laws in developing countries[[29]](#footnote-29). Part I examines de jure inequality while Part II considers the scope and structure of anti-discrimination laws in more detail. Part III addresses the particular problems raised by the informal sector while Part IV examines different legal structures for enforcement and implementation of equality and anti-discrimination laws. A separate paper addresses in detail the right to equal pay for work of equal value.

***Coverage***

The review is based on material available on-line or in libraries, including: primary legislation; country reports to fulfil international human rights obligations, including the ILO; data; and secondary literature where available. The main sources 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)[[30]](#footnote-30) and The Inter-American Commission for Human Rights (IACHR)[[31]](#footnote-31) has also been included, where relevant. Primary materials include constitutions and statutes from individual countries, where available, and some secondary materials where accessible.

**Part II: Formal Equality**

Parts II and III address anti-discrimination law in a selection of developing countries in each of the major regions of the world. Among low income countries, it 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.

In many jurisdictions, inequality remains enshrined in law. This is true for a range of rights, including rights to property, social security and contract. In addition, in many situations, women are excluded from the most fundamental legal protection, namely protection against violence, whether by husbands, employers, peers or the State itself. Without such rights, labour 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.[[32]](#footnote-32) 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 labour market and inheritance.[[33]](#footnote-33) 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.

***De jure inequality: Personal laws which directly impact women’s economic opportunities***

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. 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, training, career progression or solidarity at work.

In some countries de jure inequality is enshrined in exemption clauses for personal or customary law in the constitution. This is true for both Botswana and Zambia. Examples of practices which might fall within this exception and which directly impact women’s economic opportunity and affluence include early marriage, property grabbing by the husband’s family on his decease, 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.[[34]](#footnote-34) 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. [[35]](#footnote-35)

Important progress is being made in many of the countries under consideration. In South Africa, 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.’[[36]](#footnote-36)

The new Zambian draft constitution declares that all laws, customary or regulatory that permit or have the effect of discriminating against women are void. 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.[[37]](#footnote-37) 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.[[38]](#footnote-38)

However, change is still slow in coming. In Zambia, as we have seen, rural widows still frequently face challenges in maintaining their property rights; in the Philippines there is still a total prohibition on divorce and abortion; 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. 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. In Kenya, the proposed unified Marriage Bill does not prohibit polygamy. Moreover, discriminatory Muslim inheritance laws remain exempt from constitutional review.

***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.[[39]](#footnote-39) The CEDAW committee has regularly urged State parties to give priority attention to combating violence against women and girls. (For legislation on sexual harassment at work, see further below.)

***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 labour 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 favour of men, such as their customary right to treat their wives in the same way as minor children;[[40]](#footnote-40)
* In the case of Zambia, harmful practices such as sexual cleansing,[[41]](#footnote-41) polygamy, bride price (lobola) and property grabbing;[[42]](#footnote-42)
* 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 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. [[43]](#footnote-43)
* In the case of South Africa,[[44]](#footnote-44) 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;[[45]](#footnote-45)
* In the case of Kenya, harmful practices, including female genital mutilation (FGM), polygamy, bride price and wife inheritance.[[46]](#footnote-46)

**Part III Discrimination laws**

***The problem***

Even where de jure discrimination has been abolished, women continue to display high rates of disadvantage in the labour 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 labour force because their income is essential for family survival, but their responsibilities at home are undiminished.[[47]](#footnote-47) 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 labour 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.[[48]](#footnote-48)

Labour force discrimination in general has a corrosive effect on the labour 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 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 labour force.

**Scope and structure of legal provisions**

**Constitutional protections for gender equality in social and economic life**

Most countries have an equality guarantee within their constitutions. Furthermore several of the constitutions of the countries in this survey expressly guarantee gender equality in social and economic life and, in some cases, also specifically in working life.

For example, according to Article 11 of the Constitution of **Korea**, “All citizens shall be equal before the law, and there shall be no discrimination in political, economic, social or cultural life on account of sex, religion or social status.” In addition, according to Article 32, all citizens have the right to work and “working conditions shall be determined in such a way as to guarantee human dignity. The State endeavours to “guarantee optimum wages.” With respect to women, the Constitution holds that “special protection shall be accorded to working women, and they shall not be subjected to unjust discrimination in terms of employment, wages and working conditions.”

**Brazil** stands out, not just in having the right to equal remuneration enshrined in its Constitution, but also in its extension to age, colour and marital status as well as sex. Thus, the Constitution prohibits ‘any difference in wages, in the performance of duties and in hiring criteria by reason of sex, age, colour or marital status.’[[49]](#footnote-49)

The Constitution of **Kenya**, 2010 guarantees equality before the law and equal protection and benefit of the law.[[50]](#footnote-50) There is a specific guarantee of gender equality: “Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.”[[51]](#footnote-51) Both the State and private actors are prohibited from direct and indirect discrimination on the basis of sex, pregnancy and marital status. The Kenyan Constitution also enshrines the right of workers. Every worker has the right to fair remuneration, reasonable working conditions and fair labour practices.[[52]](#footnote-52)

The Constitution of **India** guarantees equality before the law, equal protection of the law and prohibits the State from discriminating on the basis of sex.[[53]](#footnote-53) For employment by the State there is equality of opportunity and the State cannot discriminate on the grounds of sex.[[54]](#footnote-54) The Constitution of India also contains ‘Directive Principles’. These are not enforceable in Court. However, it is “the duty of the State to apply these principles in making laws.”[[55]](#footnote-55) It is in this set of Directive Principles that the right to equal pay for equal work for men and women is found, together with a right to work, a right to a living wage, an equal right to an adequate means of livelihood for men and women, and a minimization of inequalities in income among individuals, groups residing in different areas or engaged in different vocations.[[56]](#footnote-56) The Indian Supreme Court has increasingly interpreted the justiciable rights in the Constitution in the light of the Directive Principles. Notably, the Constitutional equality guarantee applies to all persons in India, including migrants and persons of non-Indian origin. However, as Sankaran points out, it is only available against the State and is not generally binding on private individuals, such as employers, horizontally applicable. This means that those employed in the non-State sector do not have constitutional protection against sex discrimination.[[57]](#footnote-57)

More modern Constitutions tend to include pregnancy and maternity as self-standing grounds, in addition to sex. For example, the South African Constitution contains one of the most wide-ranging lists of protected grounds, including 16 prohibited grounds, including gender, sex, pregnancy, and marital status, inter alia.[[58]](#footnote-58) Similarly, the new Kenyan constitution, includes, not just sex , but also pregnancy, marital status and health status, as well as race, sex, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.[[59]](#footnote-59) 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.

The inclusion of pregnancy in the Kenyan and the SA Constitution is of particular importance as regards working women. In Canada, the U.K., the U.S., and other jurisdictions, several attempts were made to show that discrimination in work 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.[[60]](#footnote-60) 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.

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, colour or creed. Gender was not included until an amendment in 2005. Disability, age, sexual orientation, nationality and religion are not covered.

The Brazilian Constitution of 1988, 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 includes a 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, colour or marital status’; and any discrimination with respect to wages and hiring criteria of disabled workers.[[61]](#footnote-61) It is unusual, in also specifically providing for equal rights between workers in permanent employment and seasonal workers.

All 28 member states 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.’[[62]](#footnote-62) 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, colour, 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.’[[63]](#footnote-63) The EU Charter does not in 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.

The **UK** does not have a written constitution. However, an equivalent function has been performed by the EU. Thus the UK, since its accession to the EU in 1972, has been bound to implement the non-discrimination requirements in EU law. Case law from 1975 made it clear that the requirement of equal pay for work of equal value for men and women was binding both on member States and on individual employers.[[64]](#footnote-64)

**Statutory protection**

Constitutional 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. in order to prohibit discrimination by private as well as public actors. Where statutory anti-discrimination provisions exist, they are generally specific to areas such as employment, housing, education or social security.

In South Africa, the expansive approach of the Constitution is mirrored 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, colour, age, disability, religion, HIV status, conscience, language, political opinion, culture, belief and birth.[[65]](#footnote-65) 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, colour, 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]’.[[66]](#footnote-66)

At statutory level, the Kenyan Employment Act 2007 is equally expansive, prohibiting discrimination in employment on grounds of on grounds of ‘race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status.’[[67]](#footnote-67)

It was not until 2009 that the Czech Republic introduced its Anti-Discrimination Act 2009. 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 statues, 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.

However, in other 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.[[68]](#footnote-68) In 2011, this had still not been remedied. Similarly, in Bangladesh, the ILO Committee has repeatedly pointed out that the Constitution covers only the public sphere, leaving the private sphere unregulated.[[69]](#footnote-69) The Nepalese Constitution unusually prohibits both public and private discrimination. However, this has not been elaborated in precise statutory form. Nepal’s labour legislation does not provide statutory protection against discrimination, and although several years have been spent attempting to draft new legislation, at the time of writing this has not yet been passed by the Nepalese legislature.

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.[[70]](#footnote-70) Discrimination in housing clearly impacts on the extent to which workers can access decent work. Several jurisdictions protect discrimination in relation to some aspects of employment and not others. For example, the Filipino Labour Code makes it unlawful to favour 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.[[71]](#footnote-71) This can be contrasted with the Filipino Magna Carta for Women, which aims to provide comprehensive protection for women against discrimination and violation of their rights. 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.” However, the status of the Magna Carta is unclear: it is neither a constitutional nor a statutory document. Instead, many of the provisions are aspirational, requiring further detailed legislation to become operational.

**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 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, colour, 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.[[72]](#footnote-72)

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.[[73]](#footnote-73) 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.[[74]](#footnote-74) The same was true in Nepal for Dalit and indigenous women, widows and women with disabilities,[[75]](#footnote-75) and in Bangladesh, in relation to Dalit women, migrant women, refugee women, older women, women disability and girls living on the streets.[[76]](#footnote-76)

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. [[77]](#footnote-77)

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 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.[[78]](#footnote-78) In Zambia, women already suffering cumulative disadvantage were particularly prone to violence, poverty and isolation in rural areas.[[79]](#footnote-79)

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.[[80]](#footnote-80) 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.[[81]](#footnote-81)

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.[[82]](#footnote-82)

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.[[83]](#footnote-83) 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. Equality guarantees which include the possibility of extension, under a rubric of ‘any other status’ 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 approach to one simply based on unfavourable treatment because of the one’s identity, but it is unlikely that the countries under consideration have moved in this direction.

**Definition of Indirect discrimination**

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.[[84]](#footnote-84) The Nepalese constitution simply refers to equality before the law.[[85]](#footnote-85)

However, there are examples of highly developed statutory prohibitions of indirect 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.’ . Another highly developed definition of direct and indirect discrimination is found in the Filipino Magna Carta for Women 2009, which reflects the definition in CEDAW: ‘“Discrimination against women” refers 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.’[[86]](#footnote-86)

**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 favourably 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.[[87]](#footnote-87) 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.[[88]](#footnote-88) 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 Labour Act 2006 prohibits behaviour in establishments that employ female workers “which may seem to be indecent or repugnant to the modesty and honour of the female worker”,[[89]](#footnote-89) but the ILO rightly observed that provision is legally uncertain. However, in *Bangladesh National Women Lawyers Association v Government of Bangladesh and Others,* in alandmark 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.[[90]](#footnote-90) However, only employers of more than 20 employees must adopt and implement a policy statement on sexual harassment. The Czech Republic, again because of mandatory EU law, includes a provision on sexual harassment.[[91]](#footnote-91) However, neither Zambia nor Nepal expressly includes protection. \*\*

**Positive duties**

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. (Note that proactive measures do not necessarily depart from the principle of equal treatment, thereby constituting ‘affirmative action’ or ‘temporary special measures.’ The latter constitute a separate issue, which is dealt with in detail below.)

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.[[92]](#footnote-92) Thus the 1988 Constitution provides, as one of its fundamental rights, the protection of the labour market for women through specific incentives, as provided by law.[[93]](#footnote-93)

The Kenyan Employment Act 2007 places a duty on the Minister, labour officers and employers to promote equality of opportunity in employment in order to eliminate discrimination in any employment policy or practice,[[94]](#footnote-94) 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.[[95]](#footnote-95) 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 on 28 member states, including the Czech Republic, a positive duty to encourage public and private actors to ‘take effective measures to prevent all forms of discrimination on grounds of sex in access to employment, vocational training and promotion,’[[96]](#footnote-96).

**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.[[97]](#footnote-97) 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.[[98]](#footnote-98)

**Who is a worker?**

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

Definitions of worker vary, however. Under the **Korean** statute, ‘the term “worker” means a person employed by an employer and a person having the intention to be employed.’[[99]](#footnote-99)

The **Kenyan** statute applies to all ‘employees employed by any employer under a contract of service,’[[100]](#footnote-100) but excludes the armed forces, police, the National Youth Service and, most importantly, where the employer’s dependants are the only employees in a family undertaking.[[101]](#footnote-101) Since many women are employed in family undertakings, this is a serious limitation. The Kenyan Government argues that this gap is filled by the general equality provisions in section 27 of the 2010 Constitution, namely, that “women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.”[[102]](#footnote-102) However, the CEACR rightly takes the view that these provisions are not sufficient to apply the principle of equal remuneration between men and women for work of equal value in practice. It has asked the Kenyan Government to take steps to ensure that the categories of workers excluded from the Employment Act, 2007 are nevertheless guaranteed the right to equal remuneration for work of equal value.[[103]](#footnote-103)

Under the **Indian** Equal Remuneration Act, 1976, “worker” means a worker in any establishment or employment in respect of which this Act has come into force[[104]](#footnote-104). There is no further express definition of ‘worker’. ‘Employment’ is defined, as “any establishment, factory, mine, oilfield, plantation, port, railway company or shop.”[[105]](#footnote-105) At central level, the Act is being implemented by the Central Government in relation to any employment carried on by or under the authority of the Central Government or a railway administration, or in relation to a banking company, a mine, oil field or major port or any corporation established by or under a Central Act.In respect of all employments other than those where the Central Government is the appropriate Government, the implementation rests with the State Governments.[[106]](#footnote-106)

In Brazilian labour law, there are three basic categories, attracting varying degrees of protection: **employee, , independent contractor, and contingent worker**. Importantly, the factual nature of the relationship - not the contractual terms - will determine the role.[[107]](#footnote-107) **Employees** are defined by five requirements, as provided in article three of the Brazilian Labour Code. First, the employee must be an individual (i.e., a natural person). Second, an employee performs activities on a permanent and continuous - not a temporary - basis. Third, an employee is subordinate to another person. Employees receive direction and report to another person as a dependent worker. Fourth, an employee receives a salary, which is payment in return for the employees services. Finally, an employee personally provides services. In other words, an employee cannot simply choose another person to provide the agreed upon services. Rather, the employee is the only person who provides the agreed-upon services. Fourth, an employee receives a salary, which is payment in return for the employees services. Finally, an employee personally provides services. In other words, an employee cannot simply choose another person to provide the agreed upon services. Rather, the employee is the only person who provides the agreed-upon services.

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

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

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

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

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

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

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

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

The **UK** legislation applies to employment under a contract of employment, a contract of apprenticeship or a contract to do work personally (i.e. the work cannot be delegated to another to do). [[108]](#footnote-108) This is deliberately wider than the general employment law, such as that of unfair dismissal, which applies only to employees under a contract of service, which in turn requires a measure of control, integration or dependency. The question of who is a worker is also governed by EU law, which, as we have seen, is binding on the UK. In the case of *Allonby v Accrington*, which concerned agency workers, the ECJ held that because the rights to equal pay and equal treatment ‘form part of the foundations of the Community’, the concept of worker “cannot be interpreted restrictively”:[[109]](#footnote-109) It went on to say that a worker is a person ‘who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration.’[[110]](#footnote-110) Importantly, this meant that a person who was employed by an agency under a contract for services, was covered by the principle of equal treatment. Notably, and in contrast with the Kenyan legislation, the British Equality Act also applies to the civil service employment as a member of House of Commons or House of Lords staff, and service in the armed forces.[[111]](#footnote-111)

The **Ontarian** legislation has a wide definition of employee. Under the Employment Standards Act, 2000, any person who performs work for an employer for wages, who supplies services to an employer for wages, who receives training from an employer and who is a home-worker is an employee.[[112]](#footnote-112) An employer is “an owner, proprietor, manager, superintendent, overseer, receiver or trustee of an activity, business, work, trade, occupation, profession, project or undertaking who has control or direction of, or is directly or indirectly responsible for, the employment of a person in it, and any persons treated as one employer.”[[113]](#footnote-113) The Pay Equity Act covers part-time or casual employees who work at least one third of the normal work period, part-time or casual employees who work on a regular and continuing basis, although less than a third of the normal work period, and seasonal workers.[[114]](#footnote-114) An employee is defined only as someone who is not a student employed during their vacation.[[115]](#footnote-115)

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

**Who is the employer?**

Despite the fact that unequal pay might be particularly problematic, some jurisdictions exempt small businesses from the application of equal pay laws. Thus the regulations enforcing the **South Korean** Equal Employment Act exempt businesses with fewer than five workers from the equal pay provisions in Article 8 of the relevant legislation.[[116]](#footnote-116) Similarly, many jurisdictions exempt family workers and domestic workers. In South Korea, businesses or workplaces consisting of blood relatives residing together are exempt, as are housekeepers.[[117]](#footnote-117) Similarly, the Ontarian Pay Equity Act only applies to private sector employers who employ 10 or more employee. It does, however, apply to all public sector employers regardless of size and to employees’ bargaining agents.[[118]](#footnote-118)

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

Under the British Employment Act, 2010, every occupational pension scheme must be taken to include a non-discrimination rule. This prohibits a ‘responsible person’ from discriminating against a member of the scheme. A responsible person includes such as trustees or manages of the scheme, employers whose employees are or may be members of the scheme, and persons responsible for appointing those persons to office. [[119]](#footnote-119)

**Part IV 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.[[120]](#footnote-120) 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.[[121]](#footnote-121) 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.[[122]](#footnote-122) 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;[[123]](#footnote-123) the Czech Republic,[[124]](#footnote-124) Kenya;[[125]](#footnote-125) Nepal; and Zambia.[[126]](#footnote-126) 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 labour and social security legislation.[[127]](#footnote-127) Similarly, Brazil has a highly regulated set of labour 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 labour 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 labour costs or avoid regulation by hiring workers in non-standard relationships. One of the biggest challenges for labour 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.

1. *The definition of the employment relationship*: As we have seen above, many labour 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.
2. *Eligibility criteria such as years of service or continuity of employment*: Labour 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.[[128]](#footnote-128) 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.[[129]](#footnote-129)
3. *Triangular relationships: Agencies, labour 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 labour regulations or discrimination laws.
4. *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.
5. *Deliberate exclusions*: Labour legislation might exclude workers such as domestic workers, family workers or others. In addition, labour 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.[[130]](#footnote-130) Migrant workers might also be excluded. Finally, blanket exclusions might operate in relation to export zones and other specific areas where labour regulation is deliberately suspended ostensibly to attract inward investment. This can manifest in exemptions of export zones from labour laws as in Pakistan, or in weak enforcement as in India.
6. *‘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 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.[[131]](#footnote-131)
7. *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 labour inspectors.[[132]](#footnote-132) In India, enforcement officers of the labour 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.[[133]](#footnote-133)
8. *Absence of Trade Unions*: By its nature, the informal sector is very difficult to organize collectively. Without trade unions, implementation of labour rights and anti-discrimination law is heavily dependent on State funded inspectors.

Lack of protection of workers in the informal sector can undermine labour 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 labour 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 labour 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.’[[134]](#footnote-134) 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.[[135]](#footnote-135) 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 through informal work.[[136]](#footnote-136) Yet, as in many countries, the detailed code of labour 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.[[137]](#footnote-137) Only health and safety statutes apply to all work, regardless of the contractual arrangements.[[138]](#footnote-138) Arguably too, the Constitution extends more broadly: Section 23(1) gives ‘everyone’ the right to fair labour practices.

The post apartheid labour 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 labour statutes.[[139]](#footnote-139) 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.[[140]](#footnote-140) This approach has been influential in other countries such as Tanzania.

Although the statutory presumption is helpful in guiding courts towards a finding in favour 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.[[141]](#footnote-141)

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:[[142]](#footnote-142)

1. Ensuring all workers has the right to freedom of association, regardless of the nature of their employment.
2. The extension of existing labour laws to workers other than employees.
3. Skills development for informal workers.
4. Extension of social security benefits to informal workers.
5. Retention of rights accrued when in formal employment during periods in informal employment.
6. Compensation for occupational injuries and diseases.
7. Extension of health and safety at work legislation to all workers.
8. Use of incentives, such as the availability of government contracts to those who score well on indices relating to informal workers.
9. 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 enrol such workers into the social security system and philHealth.[[143]](#footnote-143) In India, several commissions have investigated the possibility of extending labour laws to cover informal workers.

Below I consider some specific sectors of informal or non-standard work and the nature of regulation.

**Part-time, temporary and agency workers**

Some jurisdictions make particular provision for irregular workers. This is helpful in two ways. Firstly, it allows legislation to address discriminatory pay structures for part-time or temporary workers. Since women frequently predominate amongst irregular workers, they will be the chief beneficiaries. Secondly, legislation which confines to employees gives employers an incentive to use out-sourced labour. One way of addressing this is to give agency workers comparable rights to those employed by the end-user.

This approach has been used in the EU, where three separate Directives have been passed to attempt to deal with this matter: the Part-Time workers, fixed term workers and agency workers directives. The Part-Time Workers’ Directive states that: ‘in respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part time unless different treatment is justified on objective grounds.’ [[144]](#footnote-144) Notably, however, the scope of comparison is very limited. Under the Directive, the part-time worker can only compare herself with a full-time worker in the same establishment having the same type of employment contract or relationship and who is engaged in the same or similar work. There is no possibility of comparison with a full-time worker doing work of equal value. However, if there is no comparable full-time worker in the establishment, the Directive permits reference to be made to an applicable collective agreement, or in accordance with national law, collective agreement or practice. When transposed into British law, the comparison became even more restrictive, applying only to workers engaged in ‘the same or broadly similar work’ at the same establishment and on the same type of contract. Only if there are no comparable full-time workers at the employer’s establishment, can the comparison be drawn with a worker in a different establishment of the same employer.[[145]](#footnote-145)McColgan argues that ‘the comparator problem is so overwhelming as to render the [regulations] largely irrelevant to the vast majority of part-time workers.[[146]](#footnote-146)’’ Indeed, it appears that only one sixth of the 6 million part-time workers in the UK are likely to find a comparator within the meaning of the regulations and only around 40,000 individuals would benefit from the equal treatment principle.[[147]](#footnote-147)

The principle of pro-rata applies where appropriate. The Directive applies to part-time workers with an employment contract or employment relationship as defined in the member states. It has been held that a part-time worker employed under a ‘framework contract’ with no set hours (similar to a zero hours contract) was covered by the Directive. [[148]](#footnote-148)

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After many years of negotiation, the EU finally agreed a directive on temporary agency work, which came into force on 5 December 2008.[[150]](#footnote-150) The Directive provides, inter alia, that ‘the basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job.’ Member States had three years to transpose its provisions into national law, i.e. by 5 December 2011 and the UK implemented it in the form of the Temporary Agency Workers Regulations 2010.[[151]](#footnote-151) The Regulations apply to ‘triangular relationships’, where a temporary work agency (TWA) supplies agency workers to work temporarily for a third party (the hirer). The agency worker works temporarily under the supervision and direction of the hirer but only has a contract (an employment contract or a contract to perform work or services personally) with the TWA. [[152]](#footnote-152) The Regulations also apply to agency workers supplied through an umbrella company or a chain of agencies. (For example, a hirer might engage an agency to manage its recruitment process, using other recruitment agencies where necessary to supply the workers.) There are several key elements which must be fulfilled to be an ‘agency worker’ for the purposes of the regulations. Firstly, there must be a contract (an employment contract or a contract to perform work personally) between the worker and a TWA. Secondly, the worker must be temporarily supplied to a hirer by the TWA; thirdly, when working on assignment the worker is subject to the supervision and direction of that hirer; and finally, the individual in question is not in a business on their own account.

Under Regulation 5 of the Temporary Agency Worker Regulations, an agency worker A is entitled to the same basic working and employment conditions as A would be entitled to for doing the same job had A been recruited by the hirer directly (either as an employee or a worker) at the time the 12 week qualifying period commenced.[[153]](#footnote-153) Relevant terms and conditions are those that are ordinarily included in the contracts of employees or workers of the hirer depending on whether A is recruited as an employee or worker (that is under a contract to perform personal services). These can be determined by collective agreement or otherwise. This means that, inter alia, that A is entitled to the same pay as if he or she had been recruited directly. Pay includes hourly or weekly pay; overtime pay; pay for shift work, unsocial hours and risks rates; and bonuses, performance-related pay connected to the individual’s work. Notably, however, it does not include equal treatment on pensions; sick pay; maternity, paternity or adoption pay; bonuses linked to company performance which reward loyalty; or length of service and redundancy pay or expenses.

There is no express requirement of an actual comparator. However, Regulation 5 will be deemed to be complied with if the agency worker is working under the same terms and conditions as a ‘comparable employee’. A ‘comparable employee’ is an employee working at the same establishment under the supervision and direction of the hirer and engaged ‘in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification and skills.’[[154]](#footnote-154) Where there is no comparable employee based at that establishment, it is possible to refer to a comparable employee at another establishment of the hirer.

Agency workers who have a contract of employment with an agency and are paid by the agency in between assignments are excluded. The 12 week qualifying period re-starts if the worker starts a new role with the hirer involving substantively different work or duties, or has a break of more than 6 weeks from work for the hirer (unless their leave is due to certain permitted reasons).[[155]](#footnote-155) To avoid agencies or hirers intentionally rotating agency workers to avoid equal treatment rights, an agency worker is deemed to have qualified for equal treatment if they are rotated in more than two different roles or hired on more than two assignments with the hirer or an associated company.

The Agency Workers Regulations have several advantages. Most importantly, they give agency workers the right to equal pay without having to have the same employer as their comparator. Moreover, at least in principle, they make use of a hypothetical comparator. The question is not primarily whether the worker is paid less than an actual comparator, but what the worker would have been paid if they had been employed directly. However, the Regulations have some serious drawbacks. Firstly, they only kick in after 12 weeks of employment and then re-start on every new assignment or with every new different hirer. There seems to be no good reason why employers should be entitled to underpay agency workers just because they have worked less than 12 weeks. Moreover, this gives hirers and agencies an incentive to avoid the application of the provisions. The anti-avoidance measures are not strong enough to prevent this. Secondly, the Regulations differentiate between ‘workers’ and ‘employees’. There is therefore an incentive on an employer whose directly employed staff are characterised as employees to avoid the regulations by characterising agency workers as non-employee workers. Thirdly, the Regulations only provide for equal pay for the same or similar work. There is no provision for equal pay for work of equal value.

Provisions governing irregular workers are also found in other jurisdictions. One of these is South **Korea**. Lee shows that although fixed term and part-time employees are often involved in the same or similar tasks as their regular counterparts, their terms and conditions are often well below those of regular workers. This led to the enactment of the Fixed-Term and Part-Time Employees Protection Act 2006*[[156]](#footnote-156)* which prohibits discriminatory treatment against fixed – term and part-time workers. The Act was enforceable in businesses with more than 300 employees from July 2007, and extended to all businesses or workplaces, except those with fewer than 5 employees from July 2009.[[157]](#footnote-157) Businesses or workplaces which employ only relatives living together with their employer and domestic workers are also exempt. The legislation defines a fixed term employee one who signs a labour contract for a specified time period[[158]](#footnote-158) while a part time employee’s “contractual working hours per week are shorter than those of a full-time worker engaged in the same kind of job in the same workplace.”[[159]](#footnote-159) “Discriminatory treatment” refers to ‘unfavourable treatment in terms of wages and other working conditions etc. given without any justifiable reasons.’[[160]](#footnote-160)

As in the case of EU legislation, the scope of comparison is limited to the same company and only like work can be compared. Thus Article 8(1) prohibits an employer from discriminating against a fixed term employee ‘on grounds of his/her employment status compared with other workers engaged *in the same or similar kinds of work* under a non-fixed term labour contract *in the business or workplace concerned*’ (italics added).[[161]](#footnote-161) Similarly, Article 8(2) prohibits an employer from discriminating against a part-time employee ‘on the ground of his/her employment status compared with full-time workers *engaged in the same or similar kinds of work* in the *business or workplace concerned*.’ (italics added).[[162]](#footnote-162)

Korean legislation has also addressed the issue of agency workers, or dispatched workers, in the Act on the Protection, Etc., of Dispatched Workers 1998.[[163]](#footnote-163) The Act defines a “dispatched worker” as a worker who, while maintaining an employment relationship with a “sending employer,” such as a temporary agency, engages in work for a “using employer” in compliance with direction and order of the using employer and in accordance with a worker dispatch contract.[[164]](#footnote-164) As in the Fixed-Term and Part-Time legislation, discrimination is defined as “unfavourable treatment in terms of wages and other working conditions... without any justifiable reasons.”[[165]](#footnote-165) The Act provides that both ‘a sending employer and a using employer shall not treat a dispatched worker in a discriminatory manner in comparison with a worker who performs the same work in the business of the using employer.’[[166]](#footnote-166)

In both cases, unfavourable treatment is not discriminatory if it can be justified by reasonable reasons. Thus a difference in treatment of part-time workers can be justified if the pay is pro rata or proportional to working hours. Lee suggests that other possibilities for justifying unfavourable treatment might include different responsibilities or duties for each task, or different productivity.[[167]](#footnote-167) It is important, however, that the justification does not simply replicate the discrimination. Remedies lie to the Labour Relations Board, which may investigate and conduct a preliminary hearing.[[168]](#footnote-168) If discrimination is found, the Labour Relations Board may issue a ‘correction order’, which may include correction order may include suspending discriminatory actions, improving working conditions, such as wages, etc., and making adequate monetary compensation. If an employer fails to comply, the Minister of Labour may impose civil fines of up to $100,000.[[169]](#footnote-169)

There are other remaining issues. Lee points out that it has still not been established if the comparison should be of the whole package of terms and conditions, or whether the particular components can be compared.[[170]](#footnote-170) Thus if an employee has better holiday conditions but a lower salary, has discriminatory treatment occurred?

In **Brazil,**  the situation is covered by legislation concerning ‘contingent’ workers. Contingent workers are strictly regulated: contingent work agreements are only permitted in two situations. First, contingent workers are permitted to replace a regular employee who is on temporary leave. Second, if an employer is experiencing an unusual and temporary increase in workload, it may employ contingent workers, but only for a temporary period of time.[[171]](#footnote-171)

 As is the case with agency workers, contingent workers are generally supplied by contingent work firms. Employment protection rights under the Brazilian labour code attach to their employment relationship with the contingent work firm. Most importantly for our purposes, contingent workers must receive equivalent salaries as those employees in the same occupational category at the client company. Contingent workers may be employed for a maximum of three months, a period which may be renewed only once with the approval of the Labour Ministry. After six months’ employment, the worker must be regarded as an employee.[[172]](#footnote-172)

In **South Africa,** there has been an exponential increase in the use of agency workers in order to circumvent labour laws, presenting a particular challenge for the labour law framework. [[173]](#footnote-173) 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 labour brokers or agencies (known as Temporary Employment Services or TESs), where wages are significantly lower than those of directly employed workers.[[174]](#footnote-174)

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 labour 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 labour 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.[[175]](#footnote-175)

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.[[176]](#footnote-176) 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 labour law protections.’[[177]](#footnote-177) 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.’[[178]](#footnote-178)

In **India**, as we have seen, nearly 93 per cent of women workers are in unorganised or informal employment and their numbers are steadily rising.[[179]](#footnote-179) Yet it has been difficult to include them within the scope of labour law protection. In 1982, the Supreme Court held that casual daily-rated employees were entitled to the same pay scale as regular employees.[[180]](#footnote-180) The Court noted both classes of employee required similar qualifications, the casual employee had no less arduous duties and responsibilities and both work long and inconvenient hours with constant security risks.[[181]](#footnote-181) However, in 2013, the courts restricted the application of equal pay. In the *State of Haryana v Tilak Raj*, the Supreme Court held that even if a daily rated employee is doing the same work as a regular employee he or she cannot be granted the same pay scale.[[182]](#footnote-182) Similarly, the Delhi High court has held that the principal of equal pay for work of equal value cannot be extended to casual workers as they do not possess the same qualifications as regular workers even though both workers are performing similar tasks. According to Justice Muralidhar: "Daily-rated workers are not required to possess the qualifications prescribed for regular workers, nor do they have to fulfil the requirement relating to age at the time of recruitment. They are not selected in the manner in which regular employees are selected."[[183]](#footnote-183)

There are several other statutes which potentially apply to non-regular workers but still contain significant exclusions. For the purposes of the Minimum Wage Act 1948, an employee is a person employed for hire to do any work, skilled or unskilled, manual or clerical in a scheduled employment in respect of which minimum rates of wage have been fixed. The definition of employee includes out-workers who perform their work either at home or some other location other than the central place of employment.[[184]](#footnote-184) However, if in any scheduled employment less than a 1,000 employees are engaged in such employment in the whole State there is no obligation to regulate minimum wages.[[185]](#footnote-185) This excludes the majority of workers in the unorganised sector. Moreover, there is no express requirement that minimum wages adhere to the principle of equal pay for work of equal value. Thus the danger is that minimum pay rates will replicate gender discrimination. (However, it appears two Indian States (Karnataka and Kerala) have included domestic workers in their minimum wage schedules.[[186]](#footnote-186))

The Contract Labour (Regulation and Abolition) Act 1970 provides certain minimum rights to contract workers, for example a right to a canteen and restrooms.[[187]](#footnote-187) The duties and obligations under the Act lie with the contractor and not the principal employer. A contractor undertakes to produce a given result for an establishment through contract labour which is more than the mere supply of goods.[[188]](#footnote-188) However, the Act does not apply to out-workers which are defined as “a person to whom any articles or materials are given out by or on behalf of the Principal employer to be made up, cleaned, washed, altered, ornamented, finished, repaired, adapted or otherwise processed for sale for the purposes of the trade or business of the principal employer and the process is to be carried out either in the home of the out-worker or in some other premises” Nor does the Act apply to establishments in which only intermittent or casual work is performed or where twenty or more people are employed or were employed any time during the past year.[[189]](#footnote-189)

In a more express attempt to include irregular workers, the Indian Government promulgated the Unorganised Workers Social Security Act in 2008. The unorganised sector is defined as an enterprise owned by individuals or self-employed workers and engaged in the production or sale of goods or providing services of any kind whatsoever; and where the enterprise employs workers, the number of such workers is less than ten.[[190]](#footnote-190) The Act requires the State to formulate welfare schemes for home-based workers, self-employed workers and wage workers employed in the unorganised labour sector, including migrant workers and domestic workers.[[191]](#footnote-191). The Act requires the Central government and State governments respectively to formulate and notify welfare schemes for unorganised or irregular workers with respect to life and disability cover, health and maternity benefits, old age protection (Central Government) [[192]](#footnote-192) and provident funds, employment injury, housing, educational schemes for children, skill up-gradation for workers, funeral assistance and old age homes (State Governments).[[193]](#footnote-193) All unorganized workers above 14 years of age are eligible for registration, presumably to qualify them as beneficiaries of the schemes. However, here too there is no provision entitling unorganised workers to equal pay for work of equal value nor is there any reference to gender equality or non-discrimination.

There is very little provision for irregular workers in the **Ontario** scheme. Although the Employment Standards Act regulates temporary help agencies, it makes no mention of equal pay between agency workers and directly employed workers. The Pay Equity Act requires a job class and only compares that job class within the same employment. The Hearings Tribunal has clearly stated pay equity is not about individuals. Moreover, the Act only allows comparisons within one employer. There is no comparison of different employers. This means it is unlikely that non-standard workers are able to benefit from equal pay provisions.

**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. Privatisation 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 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.[[194]](#footnote-194)

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.[[195]](#footnote-195)

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.[[196]](#footnote-196) 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.[[197]](#footnote-197)

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 labour 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.[[198]](#footnote-198) 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 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.’[[199]](#footnote-199) 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 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.’[[200]](#footnote-200) A constitutional amendment to extend all social rights in Article 7 of the Constitution to domestic workers has been announced. Brazilian labour 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.[[201]](#footnote-201) Domestic work under the age of 18 has been declared as one of the worst forms of child labour.[[202]](#footnote-202)

However, here—as in labour law more generally—a distinction is drawn between ‘employed’ and ‘self-employed’ domestic workers, with protection extending only to the former.[[203]](#footnote-203) 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.[[204]](#footnote-204) 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.[[205]](#footnote-205) 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 policies seeking to reduce the incidence of low-wage jobs and to narrow racial and gender inequalities.[[206]](#footnote-206)

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 Labour 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.[[207]](#footnote-207)

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.[[208]](#footnote-208)

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 law, 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.[[209]](#footnote-209) Indeed, despite the rise in wages, domestic workers remain the lowest paid category of workers in South Africa, earning just over half the hourly wage of the next lowest group, farm workers.[[210]](#footnote-210)

In other countries, some attempts have been made to incorporate domestic workers. The Labour 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.[[211]](#footnote-211) 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.[[212]](#footnote-212) In India, the focus has been on providing social security schemes for workers in the informal sector including domestic workers.[[213]](#footnote-213) Notably, however, it is highly unusual for regulation to include members of the employer’s family.[[214]](#footnote-214)

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 labour inspection and low levels of education among domestic workers.[[215]](#footnote-215) 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.’[[216]](#footnote-216) While the previous dispute resolution processes resulted in only 20 percent of disputes being settled, the CCMA has facilitated a national settlement rate of 70 percent and greater.[[217]](#footnote-217) In its 2010 report, it claims with pride that the rate of settlement is now higher than the rate of awards.[[218]](#footnote-218) 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.’[[219]](#footnote-219) 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.[[220]](#footnote-220)

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 labour. 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.[[221]](#footnote-221)

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 here, human trafficking is a serious problem. This is true for Bangladesh,[[222]](#footnote-222) Botswana,[[223]](#footnote-223) Brazil,[[224]](#footnote-224) Czech Republic,[[225]](#footnote-225) India,[[226]](#footnote-226) Nepal,[[227]](#footnote-227) the Philippines,[[228]](#footnote-228) South Africa,[[229]](#footnote-229) and Zambia.[[230]](#footnote-230) 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;[[231]](#footnote-231) secondly, increasing efforts at international, regional and bilateral co-operation;[[232]](#footnote-232) 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.[[233]](#footnote-233) 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, colour, 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 favourable 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.’

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;[[234]](#footnote-234) 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.[[235]](#footnote-235) 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 and in countries of employment.[[236]](#footnote-236) 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.’[[237]](#footnote-237) 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.[[238]](#footnote-238) 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.’[[239]](#footnote-239)

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.[[240]](#footnote-240) In addition, these countries have been urged to improve counselling and medical assistance for 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 labour 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.[[241]](#footnote-241) 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.[[242]](#footnote-242) The Zambian Law Development Commission is therefore calling for reconsideration of this law.

**Part V 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 labour law or discrimination issues, such as tribunals or dedicated labour 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. *Labour inspectorates*: Labour 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 labour 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.[[243]](#footnote-243) In Botswana, this is true both of women and of other poor people, such as members of the San/Basra groups and other non-Tswana groups, who experience difficulties accessing courts, due to high fees and absence of legal aid in most cases.[[244]](#footnote-244) Also highly problematic is the difficulty in accessing adequate interpretation services.[[245]](#footnote-245) 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.[[246]](#footnote-246) Similarly, CERD has recommended that Botswana provide adequate interpretation services.[[247]](#footnote-247) Insufficient legal aid is also a point of concern in South Africa,[[248]](#footnote-248) 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.[[249]](#footnote-249)

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.[[250]](#footnote-250)

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.[[251]](#footnote-251)

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 labour 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.[[252]](#footnote-252) 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.[[253]](#footnote-253)

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 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.[[254]](#footnote-254) 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.

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.[[255]](#footnote-255)

**Criminal Law and Labour inspectorates**

Many jurisdictions provide for criminal remedies or fines. Thus under the **Kenyan** Employment Act, when an employer contravenes the provisions on sex discrimination and unequal pay, the employer is liable to a fine not exceeding 50,000 shillings or to imprisonment not exceeding 3 months or both.[[256]](#footnote-256) In sex discrimination proceedings the employer bears the burden of proof.[[257]](#footnote-257)

Criminal remedies are, however, dependent on the availability of a labour inspectorate with sufficient resources to pursue claims. Thus in its report of 2011, the **Kenyan** Commissioner for Labour underlined the acute shortage of inspectors, vehicles to transport inspectors to workplaces, and information technology.[[258]](#footnote-258)Similarly, the CECR in 2008 noted with concern that minimum wages in the Philippines were not being enforced, largely due to a shortage of labour inspectors. This was true too for health and safety, where inspections of workplaces were infrequent and ineffective.[[259]](#footnote-259)

A similar picture emerges in relation to **India**, where a comprehensive framework of criminal remedies and labour inspectors is provided by statute, but is often rendered ineffective due to shortage of resources. The **Indian** Equal Remuneration Act has provided a comprehensive de jure system for enforcing equal pay. Both the State and Central Government are required to establish an Advisory Committee to increase employment opportunities for women.[[260]](#footnote-260) The Government may appoint officers, not below the rank of Labour Officers to hear and decide claims of unequal pay and any other complaints made under the Act.[[261]](#footnote-261) The Labour Officer determines whether work is of the same or similar nature when deciding complaints of unequal pay.[[262]](#footnote-262) After a hearing, the Labour Officer has the power to order payment of wages and direct that adequate steps be taken to ensure there is no contravention of the Act.[[263]](#footnote-263)

In conjunction with hearings by a Labour Officer, there is a positive obligation on the State and Central Government to investigate unequal pay. The Equal Remuneration Act, 1976 (ERA) creates inspectors to determine whether or not the provisions of the Act are enforced by employers. The inspectors may enter any place of employment and examine employment records and take on the spot evidence from any person.[[264]](#footnote-264) If an employer fails to comply with a request from an inspector he faces a sentence not exceeding one month in prison, a fine not exceeding 10,000Rs or both.[[265]](#footnote-265) If the employer is found to pay men and women unequally for the same work or work of a similar nature or discriminates between men and women in contravention of the Act, he or she is liable to a fine of not less than 10,000Rs but not more than 20,000Rs, for a first time offence the a sentence of 3 months to 1 year or both a fine and imprisonment. For subsequent offences to the maximum sentence is increased to 2 years.[[266]](#footnote-266)

If a company is guilty of or even negligent in not paying women equally, all those who are in a position of authority in the company are deemed liable.[[267]](#footnote-267) Both the individual and the Government make file a complaint in court. The Act states that “no court inferior to that of a Metropolitan Magistrate or Judicial Magistrate of the first class” has the jurisdiction to consider an offence under the Act.[[268]](#footnote-268)

In the central government’s sphere of influence, the enforcement of the ERA is entrusted to the Chief Labour Commissioner who heads the Central Industrial Relations Machinery (CIRM).  The Central Government has appointed Labour Enforcement Officers as Inspectors for the purpose of conducting investigations as to compliance with the ERA by demanding production by employers of relevant registers/records, who are required to maintain a roll of employees in a specified form.  Assistant Labour Commissioners have been appointed as authorities for the purpose of hearing and deciding complaints with regard to the contravention of any provision of the Act, including claims arising out of non-payment of wages at equal rate to men and women workers.  Regional Labour Commissioners have been appointed as appellate authorities to hear complaints in respect of cases decided by the ALCs. In the case of employment where the State Government are appropriate authorities, the enforcement of the provisions of the ERA, 1976 is done by the officials of the State Labour Department.  The Central Government monitors the implementation of the provisions of the ERA by the State Governments.[[269]](#footnote-269)

However, the enforcement system suffers from patchy de facto enforcement. According to figures supplied by the Indian Government to the CEACR, the number of inspections of establishments falling within the competence of the Central Government increased slightly from 3,004 in 2006–07 to 3,224 in 2007–09. In almost all of these inspections, of these inspections, violations were identified: 3,051 violations were detected, 2,712 were rectified and 439 prosecutions launched in 2007–08. [[270]](#footnote-270) The CEACR believes the increase in inspections and violations suggests that there are widespread violations of the Equal Remuneration Act. As the Committee pointed out, the increase in the number of inspections was accompanied by an increase in violations detected, suggesting that in practice, violations of the Acts are widespread. [[271]](#footnote-271)

A more pessimistic pattern is evident at state level. Data received by the Committee from ten states or union territories revealed that 27,290 inspections had been carried out in 2006–07, dropping to 24,441 in 2007–08. Yet in 2007–09, only 172 violations were detected in these ten states and union territories and 158 were rectified, while a mere six prosecutions were launched. [[272]](#footnote-272) The Committee was particularly concerned at how few violations had been detected, especially when compared with the record of the Central Government. It stressed that the low level of violations detected by the authorities of the states and union territories did not indicate that such violations do not occur; instead, this strongly suggested the need for better dispersal of information and training, and stronger enforcement action.[[273]](#footnote-273)

Sankaran adds that ‘labour administration officials lack transport facilities, and are understaffed, and laws specifically affecting women, such as those dealing with equal remuneration or maternity benefit, are not subject to the same numbers of inspections as general laws affecting all workers.[[274]](#footnote-274) Sankaran notes there are a small number of women enforcement officers in the various labour departments which makes it difficult to detect violations of the Equal Remuneration Act.[[275]](#footnote-275) Moreover, the labour officials are understaffed and there is a lack of transport facilities necessary for effective investigations therefore “equal remuneration [is] not subject to the same number of inspections as general laws affecting all workers.”[[276]](#footnote-276)Yet the CEACR noted that taken together the number of inspections for these ten states and union territories had decreased.

The Centre of Indian Trade Unions has called for reform of the enforcement of the ERA. Specifically they advocate for special units in the labour department to monitor sex discrimination in wages, classification and promotion, and an increase in the involvement of female officers in hearing and deciding complaints. They also argue that trade unions should have standing to lodge complaints.[[277]](#footnote-277) However, the Indian government informed the CEACR in 2005 that it might not be practicable for State governments to set up special units exclusively to monitor the ERA, given the low level of violations reported. This seems to ignore the fact that the lack of reported violations is more likely due to lack of inspection than to lack of breach. The Government did, however agree that the involvement of female officers in hearing and deciding equal remuneration complaints could be arranged, subject to availability. It has not agreed to give trade unions standing to bring cases in their own right; but instead recognises the competence of four institutions to bring complaints: the Centre of Women Development Studies, the Institute of Social Studies Trust, the Working Women’s Association and the Self-Employed Women’s Welfare Association.[[278]](#footnote-278) However, experience from other countries suggests that it is of great importance to give trade unions standing to pursue complaints.

**Civil Remedies and Alternative Disputes Procedures**

A second option is to provide a civil remedy through a court or tribunal. This might lead to monetary compensation for the individual, or potentially, injunctive relief requiring an employer to put in place a pay equity system. In **Kenya**, the Industrial Court is empowered to settle disputes about the application of the Employment Act, and for the purposes of the provision regarding equal remuneration, the burden of proving the absence of discrimination is placed upon the employer.[[279]](#footnote-279) However, the Kenyan government in its submission to the CEACR indicated that there had been no judicial decisions.[[280]](#footnote-280)

In the **UK,** the sole form of remedy (outside of collective bargaining) has been through a complaint to an employment tribunal. Yet tribunal statistics are disappointing. Whereas 8,229 new equal pay applications were received in 2004 - 05, this figure rocketed to 44,013 in 2006 - 07. Yet only 2% of equal pay claims were successful at tribunal in that year, amounting to 126 claims in total.[[281]](#footnote-281) In 2011-12, 23,800 equal pay claims were dealt with, yet only 67 reached a hearing, and a mere 32 were successful.[[282]](#footnote-282)

The Canadian province of Ontario has a range of enforcement mechanisms. Under the Pay Equity Act, an employer, employee, group of employees or bargaining agent may file a complaint with the Pay Equity Commission that there is a contravention of the Pay Equity Act.[[283]](#footnote-283) To file a complaint, the applicant must submit an “Application for Review Services” to the Pay Equity Office.[[284]](#footnote-284) A review officer then investigates the complaint and looks to effect a settlement.[[285]](#footnote-285) The review officer has the power to enter any place, inspect documents, question any person and certify that a job class is female or male.[[286]](#footnote-286) If the review officer concludes that the pay equity plan has not been implemented they may order compliance with it.[[287]](#footnote-287) If the employer fails to comply with the review officers order the matter is referred to the Hearings Tribunal.[[288]](#footnote-288) The employer also has the right to request a hearing before the Tribunal.[[289]](#footnote-289) The Tribunal order can confirm, vary or revoke the order of the review officer, may order a revision of the pay equity plan and make “adjustments in compensation in order to achieve pay equity.”[[290]](#footnote-290)Failure to comply with an order of the Hearing Tribunals is an offence. The employer, if an individual, can be fined no more than $5000. If the employer is not an individual the maximum fine is $50,000.[[291]](#footnote-291) Review officers are also under an obligation to monitor the implementation of pay equity.[[292]](#footnote-292)

Under the Ontarian Employment Standards Act, if an employment standards officer finds an employer has contravened the equal pay provision, the officer can deem the amount owing to be unpaid wages of the employee.[[293]](#footnote-293)

The Pay Equity Commission reported in 2009-2010 that “over $CAD1 million has been paid to employees in female-dominated job classes as a result of pay equity”[[294]](#footnote-294) In 2010-2011, there were a 162 new complaints filled.[[295]](#footnote-295) The Commission found that “many employers have never done any form of pay equity.”[[296]](#footnote-296) Nevertheless, in 2010-2011, the Commission reported that the number of senior review officers decreased from 15 to 8.[[297]](#footnote-297)

**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 General Assembly in 1993 (General Assembly Resolution 48/134),[[298]](#footnote-298) 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.[[299]](#footnote-299) 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.[[300]](#footnote-300)

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.[[301]](#footnote-301) 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.[[302]](#footnote-302) 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.[[303]](#footnote-303) 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.[[304]](#footnote-304)

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.[[305]](#footnote-305) 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 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.[[306]](#footnote-306) **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.[[307]](#footnote-307) CERD took the view that the positive experience of the Kenya commission should be reinforced when considering new institutional arrangements.[[308]](#footnote-308)

**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 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.[[309]](#footnote-309)

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.[[310]](#footnote-310) CEDAW was similarly concerned that the Ombudsman had limited powers.[[311]](#footnote-311)

**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.

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 Labour and Home Affairs. The Department of Women’s Affairs had continued its awareness-raising activities on gender equality issues.[[312]](#footnote-312) However, the CEDAW committee, also reporting in 2010, noted with concern that the Women’s Affairs Department, located within the Ministry of Labour 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.[[313]](#footnote-313) 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.[[314]](#footnote-314)

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.[[315]](#footnote-315) 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.[[316]](#footnote-316) 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.[[317]](#footnote-317)

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.[[318]](#footnote-318) 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.[[319]](#footnote-319)

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,[[320]](#footnote-320) 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.[[321]](#footnote-321) 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.[[322]](#footnote-322) 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.[[323]](#footnote-323)

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 consistent with the promotion of equality or the elimination of discrimination in the workforce.’[[324]](#footnote-324)

Some countries, such as Botswana[[325]](#footnote-325) and Zambia,[[326]](#footnote-326) 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.[[327]](#footnote-327)

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.[[328]](#footnote-328)

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 2002[[329]](#footnote-329) ‘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.[[330]](#footnote-330) 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 channelled 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.[[331]](#footnote-331)

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 channelling 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.[[332]](#footnote-332)

However, the impact of these programs remains unclear. CEDAW reporting in 2007 was concerned that the law establishing a quota system for women[[333]](#footnote-333) 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.[[334]](#footnote-334)

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 favour of disadvantaged groups (primarily Dalits or ‘untouchables’) identified as Scheduled Castes and Scheduled Tribes.[[335]](#footnote-335) 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.’[[336]](#footnote-336) Designated groups include black people (a generic term which means groups classified by apartheid as Africans, Coloureds 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 Labour, on the basis of which the Commission for Employment Equity compiles annual reports on progress. The Department of Labour can send inspectors to visit designated sites to check whether the situation on site reflects reports filed. Sanctions for non-compliance include fines.

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 labour market outcomes than improved access to education for Africans, the remaining educational quality differential and the employment effects of accelerated economic growth. They did 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.[[337]](#footnote-337)

**Collective Solutions**

Such remedies can be complemented by more collective bargaining. A particularly important proactive approach is to harness the social partners, and require collective agreements to implement the right to equal remuneration for men and women for work of equal value. The **Kenyan** Government has consistently indicated to the CEACR Committee that all collective agreements adhere to the principle of equal remuneration, and that it regularly encourages the social partners to promote the principle of equal remuneration through tripartite meetings organised in the context of collective bargaining.[[338]](#footnote-338) However, although copies of a number of collective agreements were provided to the CEACR in 2006, none of them made specific reference to the principle of equal remuneration or set out provisions concerning objective job evaluation and classification.[[339]](#footnote-339) The Kenyan Government does not appear to have responded to more recent requests for extracts of relevant collective agreements reflecting the principle of equal remuneration.[[340]](#footnote-340)

Another potentially innovative aspect of the Kenyan structure is the provision, under the Labour Relations Act 2007, for the Industrial Court to refuse to register any collective agreements that do not comply with any laws, directives or guidelines concerning wages issued by the Ministry of labour. However, the Kenyan Government does not appear to have responded to the CEACR’s requests for indications as to whether the registration of any collective agreement has been refused pursuant to s.60(5) because of a violation of the principle of equal remuneration.[[341]](#footnote-341) The effectiveness of the collective bargaining route is also heavily dependent on trade union density and the coverage of collective bargaining. In Kenya, the Labour Commissioner in its 2011 Report noted that in most employment premises inspected during that year, the majority of employees were non- unionised. This reflected the low density of unionization, ranging from 10 – 20% in the formal economy depending on the sector, in the country as a whole.[[342]](#footnote-342)

At EU level, Directive 2006/54/EC (Recast) provides that any provision in a collective agreement which does not comply with the principle of equal treatment between men and women should be declared null and void or amended.[[343]](#footnote-343) However, many EU countries still have collective agreements which are indirectly discriminatory, including job evaluation and pay systems that are neutral on the face of it, but appear to structurally disadvantage female workers. It has also been pointed out that the collective bargaining system can itself reproduce the difference between men and women’s pay.

Directive 2006/54/EC (Recast) also provides that the EU Member States shall, in accordance with national traditions and practice, take adequate measures to promote social dialogue between the social partners with a view to fostering equal treatment, including, for example, through the monitoring of practices in the workplace, in access to employment, vocational training and promotion, as well as through the monitoring of collective agreements, codes of conduct, research or exchange of experience and good practice. Nevertheless, most EU countries do not have legal measures in place that induce or oblige the social partners to actively address the gender pay gap in collective agreements. A notable exception is the French Génisson law of 9 May 2001, which has introduced an obligation for the social partners to negotiate on occupational gender equality. Another law of 23 March 2006 specified that the gender pay gap must disappear by 31 December, 2010.

Also important are training and awareness raising activities of employers, unions and labour inspectors.

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