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GENDER EQUALITY AND NON-DISCRIMINATION AT WORK THROUGH THE LENS OF INTERNATIONAL LABOUR STANDARDS

Abstract

International Labour Organization (ILO) adopted the Discrimination (Employment and Occupation) Convention (No. 111) and Recommendation (No. 111), 1958, as the first comprehensive instruments dealing specifically with equality and non-discrimination in respect of employment and occupation. Convention No. 111 places the general principle of equality and non-discrimination in the context of the world of work. However, other ILO standards expressly prohibiting discriminatory measures have been adopted. Considering that elimination of discrimination in respect of employment and occupation is one of the fundamental principles and rights at work, the international labour standards are of crucial importance in ensuring equality of opportunity and treatment, including gender equality. Gender equality at work relates to all men and women. It cannot be achieved without the elimination of discrimination. One of the main reasons is that gender inequality is often rooted in discrimination. Discrimination in employment and occupation is a universal and permanently evolving phenomenon. It can take a variety of forms, such as direct discrimination, indirect discrimination, discrimination-based harassment, multiple discrimination, intersectional discrimination and specific forms of discrimination, which will be discussed in the paper. In relation to gender equality, discrimination can be based on many discriminatory grounds, which are mainly linked to sex as discriminatory ground. According to ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), the notion of "sex" as a prohibited discriminatory ground has evolved to include pregnancy and maternity, civil and marital status, and family situation and responsibilities, as well as sexual harassment as a serious manifestation of sex discrimination. Therefore, discrimination based on the aforementioned grounds, including sexual harassment, will be examined. In 2019, ILO adopted the Violence and Harassment Convention (No. 190). It is the first international labour standard to address violence and harassment in the world of work, including gender-based harassment, which will also be analyzed.

Keywords: equality, discrimination, harassment, discriminatory ground, sex, gender

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I. Introduction

The action of labour law becoming international found its institutional embodiment in the ILO. The process of adopting national labour laws and codes and the gradual process of labour law becoming a discipline were paralleled by the ILO's standard-setting work at the international level. The development of national legislations and international legal instruments on labour was thus effectively organized. Indeed, the activity of creating international labour standards (ILS) based on tripartite consensus eventually produced what has often been described as an international labour code.[1] As the scope of the ILO's work expanded, Conventions and Recommendations, as well as principles enshrined in declarations or resolutions of the International Labour Conference, and comments and recommendations of its supervisory bodies, including on gender equality and non-discrimination, were adopted.[2] ILS play an important role in encouraging equality because they are a sign of an international and tripartite consensus on minimum standards. The concept of equality does not imply that men and women are identical, nor that their roles or needs are exactly the same. Gender equality at work means that both men and women enjoy equal rights, opportunities and treatment. The concept of equality, and even more that of gender equity try to give equal value and recognition to the different natures, roles and needs of both women and men.[3]

Human rights that relate to the dignity of the human being at work are called non-specific rights, since they are intended to protect workers as human beings. As compared with non-specific rights, rights like freedom of association and collective bargaining are considered specific rights, as they are specifically addressed to workers. Therefore, the right not to be discriminated against falls under the category of non-specific workers' fundamental rights.[4] In this regard, ILO Violence and Harassment Convention (No. 190)[5] – hereinafter: Convention No. 190, combines equality and non-discrimination with safety and health at work in one instrument, and puts human dignity and respect at its centre.[6] In 1958, ILO Discrimination (Employment and Occupation) Convention (No. 111)[7], – hereinafter: Convention No. 111, often described as a programmatic

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[1] See: Eric Gravel and Quentin Delpech, "International labour standards: Recent developments in complementarity between the international and national supervisory systems" *International Labour Review* 147, No. 4 (2008): 403–404; Гзиме Старова, *Меѓународно трудово право и законодавство* (Скопје: НИП Ѓурѓа, 1999), 111.

[2] See: Eric Gravel and Quentin Delpech, "International labour standards", 403–4.

[3] See: International Labour Organization, *ABC of women workers' rights and gender equality*, Second edition (Geneva: International Labour Office, 2007), 12, 91.

[4] See: Arturo Bronstein, *International and Comparative Labour Law: Current challenges* (Palgrave Macmillan, Geneva: International Labour Office, 2009), 130.

[5] ILO Violence and Harassment Convention, 2019 (No. 190).

[6] See: International Labour Organization, *Violence and harassment in the world of work: A guide on Convention No. 190 and Recommendation No. 206* (Geneva: International Labour Office, 2021), 5.

[7] ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

international labour standard, because it requires states to create and enforce a general policy to eliminate discrimination in employment and occupation[8], and the ILO Discrimination (Employment and Occupation) Recommendation (No. 111)[9] – hereinafter: Recommendation No. 111, were adopted to establish the principle of equality and non-discrimination at work on various grounds, including sex. Convention No. 111 might be seen as limited in its scope of application, since in addition to the catalogue of forbidden discriminatory grounds listed, it provides only for an optional inclusion of further grounds. Only discrimination on the basis of race, colour, sex, religion, political opinion, national extraction or social origin is prohibited under Convention No. 111. However, Member States may add other grounds to this list, but this is not compulsory.[10] While pregnancy, maternity, civil and marital status, family situation and family responsibilities are commonly prohibited discriminatory grounds under the national laws of many countries, these grounds are not covered by Convention No. 111.

The ILO's standard-related activity goes beyond adopting international labour Conventions and Recommendations, since it also includes examining how Member States apply them through several and different supervisory mechanisms. These mechanisms primarily focus on monitoring the application of ratified Conventions and involve both tripartite bodies and bodies composed of independent experts. Despite the fact that these bodies are not judicial and their decisions are not legally binding, their observations and recommendations are valuable references for interpreting the meaning and scope of the provisions. National judgments making use of ILS refer not only to the provisions but also to the corresponding work of the ILO supervisory bodies with the aim of interpreting national provisions of a similar nature or, more broadly, national law concerning the same issues.[11] According to Article 19 of the ILO Constitution, the Committee of Experts on the Application on Conventions and Recommendations (CEACR) publishes an in-depth annual General Survey on the national law and practice of member States on certain Conventions and/or Recommendations chosen by the Governing Body. This survey is based mainly on the reports received from member States and information sent by employers' and workers' organizations and also allow the CEACR to check the powerful effect of Conventions and Recommendations, analyze the difficulties reported by governments in their application and identify means of overcoming these obstacles.[12] The paper highlights the views of the CEACR.

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[8] See: Xavier Beaudonnet, "Some comments on the use of ILO standards by domestic courts" *Revue de droit comparé du travail et de la sécurité sociale* 3 (2016): 117.
[9] ILO Discrimination (Employment and Occupation) Recommendation, 1958 (No. 111).
[10] See: Bronstein, *International and Comparative Labour Law*, 126.
[11] See: Beaudonnet, "Some comments on the use of ILO standards by domestic courts", 117.
[12] See: International Labour Organization, *Rules of the game: An introduction to the standards-related work of the International Labour Organization* (Geneva: International Labour Office, 2019), 117.

II. Gender equality and types of discrimination

a. Direct discrimination and indirect discrimination

The substantive scope of Convention No. 111 is very broad. It extends to all sectors of activity and covers all occupations and all jobs in both the public and private sectors.[13] The notion of occupation refers to the trade, profession or type of work performed by an individual, regardless of the branch of economic activity to which he/she belongs or of his/her professional status.[14] This is especially significant, taking into consideration the risk of discrimination that covers access to freelance and other professions in respect of determining the conditions for access to a profession, issuing licenses and for performing a certain occupations or activities.[15] Although the Convention refers to the promotion of equality of opportunity and treatment in respect of employment and occupation, it does not only give attention to access to wage-earning employment, but also to self-employment.[16]

A fundamental definition of what constitutes discrimination is set out in Article 1 of the Convention No. 111. For the purpose of this Convention the term discrimination includes "any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;"[17] "such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies".[18] There are three components of this definition: a factual element (i.e. the existence of a distinction, exclusion or preference arising from an act or omission) which constitutes a difference in treatment; a discriminatory ground on which the difference in treatment is based; and the objective result of this difference in treatment (i.e. the nullification or impairment of equality of opportunity or treatment). When a situation involves

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[13] See: Xavier Beaudonnet, ed. *International Labour Law and Domestic Law: A training manual for judges, lawyers and legal educators* (Turin: International Training Centre of the International Labour Organization, 2010), 142.

[14] See: International Labour Organization, *Equality in Employment and Occupation: Special Survey on Equality in Employment and Occupation in respect of Convention No. 111*, Report III (Part 4B), International Labour Conference, 83rd Session (Geneva: International Labour Office, 1996), para. 79.

[15] See: Љубинка Ковачевић, *Заснивање радног односа* (Београд: Правни факултет Универзитета у Београду, 2021), 1010.

[16] See: Beaudonnet, *International Labour Law and Domestic Law*, 142.

[17] Discrimination (Employment and Occupation) Convention, 1958 (No. 111), Art. 1, 1 (a).

[18] Discrimination (Employment and Occupation) Convention, 1958 (No. 111), Art. 1, 1 (b).

these three components, discrimination is recognized. It does not have to be intentional.[19] The restrictions on the definition of discrimination that are based on its intentional nature are not in accordance with the Convention.[20] Considering that the definition refers to the "effect" of a distinction, exclusion or preference, it is evident that intention to discriminate is not required by the Convention. The definition covers all discrimination, regardless of whether the perpetrator of a discriminatory act intended it. For example, a degree from a specific, prestigious university is required by an employer as a condition of employment. This condition might not be intentionally discriminatory because the employer might argue it's for reasons like expertise. However, in practice, this requirement could disproportionately exclude candidates who attended different institutions, potentially creating indirect discrimination. In this case, even though the employer didn't intend to discriminate, the "effect" of the condition might discriminate against certain groups of people, which would still be in violation of ILO Convention No. 111. The focus is on the outcome or impact of the condition, not the intention behind it. It also includes situations in which an unequal treatment occurs without a clearly identifiable perpetrator, such as in some cases of indirect discrimination.[21]

The definition of discrimination in the Convention No. 111 implicitly includes both direct and indirect discrimination.[22] Direct discrimination refers to less favourable treatment based on one or more prohibited discriminatory grounds. Indirect discrimination is significant in cases of recognizing and addressing situations in which a certain treatment is applied uniformly to each person but disproportionately affects a particular protected group by the Convention, such as women or ethnic or religious groups. The Convention easily to understand addresses indirect discrimination because the definition makes reference to the "effect" of the offending treatment.[23] Indirect discrimination refers to apparently neutral situations, laws, regulations or practices which in fact result in unequal treatment of persons with certain characteristics. It occurs when the same condition, treatment or criterion is applied to everyone, but results in a disproportionately harsh impact on some persons on the basis of characteristics such as race, colour, sex or religion, and is not closely related to the inherent requirements of the job.[24] For example, a

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[19] See: Beaudonnet, *International Labour Law and Domestic Law*, 144.

[20] See: International Labour Organization, *Equality in Employment and Occupation, General Survey of the Reports on the Discrimination (Employment and Occupation) Convention (No. 111) and Recommendation (No. 111)*, Report III (Part 4B), International Labour Conference, 75th Session (Geneva: International Labour Office, 1988), para. 26.

[21] See: International Labour Organization, *Giving Globalization a Human Face: General Survey on the Fundamental Conventions concerning Rights at Work in Light of the ILO Declaration on Social Justice for a Fair Globalization, 2008*, Report III (Part 1B), International Labour Conference, 101st Session (Geneva: International Labour Office, 2012), para. 745.

[22] See: Ковачевић, *Заснивање радног односа*, 1012.

[23] See: Beaudonnet, *International Labour Law and Domestic Law*, 145.

[24] See: International Labour Organization, *Equality in Employment and Occupation: Special Survey*, para. 26.

policy requiring a work-related training to be undertaken at the end of the day may indirectly discriminate against workers with family responsibilities, as they may need to choose between attending training or picking-up their children from school or arranging childcare. Although the CEACR does not differentiate between distinction (e.g. treating differently), exclusion (e.g. excluding from an opportunity) and preference (e.g. preferring one person over another), interestingly, it has been noted that the exclusion of specific categories of workers from the scope of application of general labour law may also lead to their indirect discrimination.[25] The CEACR has noted that in several countries, women are primarily concentrated in the agricultural sector or in domestic work, and are highly represented among casual workers or informal economy workers. In countries with a significant number of migrant workers, who constitute an important proportion of the seasonal workers in the agricultural sector or among domestic workers, excluding these categories of workers could constitute indirect discrimination. The application of Convention No. 111 in both law and practice continues to be challenging in the informal economy. In many countries, concerns have been raised regarding the high concentration of women in the informal economy and the obstacles they face in seeking formal employment.[26] Taking into consideration that Convention No. 111 applies also to self-employed persons, their exclusion from the scope of application of general labour law should also constitute indirect discrimination. Discrimination may be *de jure*, which means that discrimination exists in law, or *de facto*, which means that it occurs in reality or in practice.[27] On the one hand, discrimination in law occurs when unequal treatment based on prohibited ground is established by general rules, such as laws or regulations. On the other hand, acts or omissions of a public service or of private individuals or bodies which treat individuals or members of a group unequally on prohibited grounds constitute discrimination in practice.[28] Convention No. 111 applies to both discrimination in law and discrimination in practice.

b. Discrimination-based harassment

Although discrimination-based harassment is not explicitly listed as a type of discrimination in Convention No. 111, it is considered as included in the

[25] See: International Labour Organization, *Achieving gender equality at work: General Survey on the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), the Workers with Family Responsibilities Convention, 1981 (No. 156), the Maternity Protection Convention, 2000 (No. 183), the Discrimination (Employment and Occupation) Recommendation, 1958 (No. 111), the Workers with Family Responsibilities Recommendation, 1981 (No. 165) and the Maternity Protection Recommendation, 2000 (No. 191)*, International Labour Conference, 111th Session, 2023 (Geneva: International Labour Office, 2023), paras. 61–2.
[26] See: International Labour Organization, *Giving Globalization a Human Face*, para. 739.
[27] See: International Labour Organization, *ABC of women workers' rights and gender equality*, 50.
[28] See: Beaudonnet, *International Labour Law and Domestic Law*, 144.

definition of discrimination. However, in the context of Convention No. 111, the CEACR has addressed discrimination-based harassment particularly in relation to sexual harassment. In this regard, CEACR highlighted that over the years it has recognized and stressed several manifestations of discrimination based on sex covered by the Convention and has previously expressed its view that sexual harassment is a form of sex discrimination and should be addressed within the requirements of the Convention.[29] The notion of discrimination-based harassment has also been addressed in relation to sex-based harassment and racial harassment.[30] In 2019, the International Labour Conference adopted the Convention No. 190 and its accompanying Recommendation No. 206[31]. Convention No. 190 is crucial for ensuring the right to equality and non-discrimination in employment and occupation, including for women workers, and is essential for preventing and eliminating violence and harassment in the world of work.[32] The Convention No. 190 and Recommendation No. 206 should therefore be seen as complementary to Convention No. 111 and Recommendation No. 111. While the more recent instruments provide a comprehensive framework to specifically address harassment in the world of work, including gender-based and other forms of discrimination-based harassment, Convention No. 111 and Recommendation No. 111 offer a long-standing framework for eliminating all discrimination, including harassment based on one or more prohibited discriminatory grounds, in respect of all aspects of employment and occupation.[33] The integrated approach of the recent Convention No. 190 to addressing harassment refers to the need to address this issue not only in equality and non-discrimination law, but also in "labour and employment, occupational safety and health, and in criminal law, where appropriate"[34].

c. Multiple discrimination, intersectional discrimination and other specific forms of discrimination

Even though multiple discrimination is also not explicitly mentioned as a type of discrimination in Convention No. 111, it is considered to be covered under the definition of discrimination. There is a fine line between the various discriminatory grounds. Discrimination can occur on more than one ground, i.e. an individual may face discrimination based on several grounds.[35]

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[29] See: CEACR, *General observation – Discrimination (Employment and Occupation) Convention, 1958 (No. 111)*, 2003.
[30] See: International Labour Organization, *Achieving gender equality at work*, para. 64.
[31] ILO Violence and Harassment Recommendation, 2019 (No. 206).
[32] See: ILO Violence and Harassment Convention, 2019 (No. 190), Articles 5–6.
[33] See: International Labour Organization, *Achieving gender equality at work*, para. 65.
[34] ILO Violence and Harassment Recommendation, 2019 (No. 206), para. 2.
[35] See: International Labour Organization, *Equality in Employment and Occupation: General Survey*, para. 31; International Labour Organization, *Equality in Employment and Occupation: Special Survey*, para. 29.

Discrimination based on sex frequently interacts with other discriminatory grounds, such as religion, age or disability. On the one hand, multiple discrimination refers to discrimination based on a multitude of discriminatory grounds[36] or multiplicity of discriminatory grounds, which are not inextricably linked, i.e. one or more prohibited grounds are only an addition to another. This is the reason why the term "multiple discrimination" and the term "additive" or "cumulative" discrimination are used interchangeably. In fact, multiple discrimination is based on any combination of discriminatory grounds. On the other hand, intersectional discrimination refers to discrimination based on several grounds, which are inextricably linked. The concept of intersectionality has been used commonly to describe complex, overlapping and compound inequalities.[37] For example, refusing employment to a female candidate of a certain age due to the assumption that she may have children in the future constitutes intersectional discrimination based on sex and age. So, it is not the addition, but the inextricable link between two discriminatory grounds (sex and age) that creates a unique disadvantage. Similarly, dismissing a worker because she wears a hijab at work could be an example of intersectional discrimination because of the fact of inextricably linking sex and religion. Additionally, the discrimination faced by black women is not the same as that experienced by white women or black men.[38] The CEACR has also noted that national laws are increasingly prohibiting other specific forms of discrimination, such as discrimination by association, discrimination based on presumed grounds, structural discrimination, segregation, denial or lack of reasonable accommodation, incitement, instruction or encouragement to discriminate against, and repeated or prolonged discrimination. Some of these forms are laid down by certain laws as severe or serious types or forms of discrimination.[39]

III. Gender equality and discriminatory grounds

a. Discrimination based on sex

The term "sex" is defined as "classification of a person as having female or male sex characteristics". The notion of "sex characteristics" is defined as "each person's physical features relating to sex". In comparison with "sex", the term "gender" is defined as "the socially constructed roles, responsibilities, behaviours, activities and attributes that a given society considers appropriate for individuals based on the sex they were assigned at birth. Moreover, gender is fluid and changes with time and cultures. For example, what is considered

[36] See: International Labour Organization, *Giving Globalization a Human Face*, para. 748.
[37] See: Colleen Sheppard, *Multiple Discrimination in the World of Work* (Geneva: International Labour Office, 2011), 3–4.
[38] See: International Labour Organization, *Achieving gender equality at work*, para. 67.
[39] See: International Labour Organization, para. 72.

masculine and feminine evolves".[40] Discrimination based on sex includes distinctions that are either directly or indirectly based on sex. It is important to note that the concept of "sex" as a prohibited discriminatory ground has expanded to include grounds like pregnancy and maternity, civil and marital status, and family situation and responsibilities, as well as sexual harassment as a serious manifestation of discrimination based on sex.[41] Over the years, the understanding of discrimination based on sex has also evolved to capture the concept of gender, understood as the socially constructed roles and responsibilities assigned to a particular sex. In this regard, the CEACR has pointed out that discrimination based on sex goes beyond distinctions based on biological characteristics, i.e. sex, and also includes unequal treatment arising from socially constructed roles and responsibilities assigned to a particular sex, i.e. gender.[42]

b. Discrimination based on maternity, including pregnancy

Discrimination based on maternity, including pregnancy, is the most evident form of discrimination based on sex since it can only, by definition, affect women.[43] The CEACR has addressed pregnancy testing as discrimination based on sex in the context of its examination of Convention No. 111.[44] Moreover, the Maternity Protection Convention, 2000 (No. 183)[45] expressly prohibits employers from requiring women to take pregnancy test or certificate confirming such a test when applying for a job, unless national laws or regulations require it in respect of certain work (i.e. work that is prohibited or restricted for pregnant or nursing women; or those where there is a recognized or significant risk to the health of the woman or the child).[46] This Convention also guarantees non-discrimination in relation to termination of employment of a woman during her pregnancy or maternity leave or leave due to illness or complications.[47] Interestingly, in some countries there are other prohibited maternity-related discriminatory grounds, such as childbirth, lactation or breastfeeding, intention to have children, or even possibility of pregnancy, e.g. in Australia. Moreover, in Latvia, treating a woman less favorably due to her granting of prenatal and maternity leave is considered to be direct discrimination based on gender,[48] not on sex as discriminatory ground.

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[40] International Labour Organization, para. 104.
[41] See: International Labour Organization, paras. 75–6; CEACR, *General observation – Discrimination (Employment and Occupation) Convention, 1958 (No. 111)*, 2003.
[42] See: International Labour Organization, *Achieving gender equality at work*, para. 77.
[43] See: International Labour Organization, *Giving Globalization a Human Face*, para. 784.
[44] See, e.g. CEACR, *Convention No. 111: Uruguay, Direct request*, 2021.
[45] ILO Maternity Protection Convention, 2000 (No. 183).
[46] See: ILO Maternity Protection Convention, 2000 (No. 183), Art. 9 (2).
[47] See: ILO Maternity Protection Convention, 2000 (No. 183), Art. 8.
[48] See: International Labour Organization, *Achieving gender equality at work*, paras. 79–81.

c. Discrimination based on civil or marital status and family situation and responsibilities

Both men and women can face challenges balancing their work and family life. While the Convention No. 111 calls for the adoption of special measures to support persons who need special protection or assistance due to reasons such as family responsibilities,[49] it does not expressly enumerate civil status, marital status, family situation or family responsibilities as prohibited discriminatory grounds. This led to adoption of the Workers with Family Responsibilities Convention, 1981 (No. 156).[50] This Convention indicates that: "Recalling that the Discrimination (Employment and Occupation) Convention, 1958, does not expressly cover distinctions made on the basis of family responsibilities, and considering that supplementary standards are necessary in this respect (...)".[51] Consequently, it is considered that discrimination based on family responsibilities is addressed by the Convention No. 156.[52] Even though both Convention No. 111 (Article 5) and Convention No. 156 make explicit reference to family responsibilities, as well as Recommendation No. 165[53] to marital status and family situation, these ILS do not define these terms. The ILS on workers with family responsibilities only indicate in relation to whom family responsibilities are covered, i.e. they are referring to dependent child and other member of the immediate family who clearly needs care or support. In some countries, civil and marital status encompass various relationships situations, such as being single, married, separated, divorced, widowed, being in a civil partnership or a former civil partner, as well as being in *de facto* partnerships or marriages.[54] Examples of discrimination include laws that require a husband's permission before his wife can accept certain jobs or contractual clauses, according to which the employment of women will terminate when they marry.[55] The CEACR has noted that the distinction between "family situation" and "family responsibilities" was addressed in its Special Survey of 1996, where it referred to "family situation (especially in relation to responsibility for dependent persons)"[56] which would seem to imply that family situation is a broader concept including, but not being limited to family responsibilities.[57]

Despite the fact that discrimination based on such grounds may affect both men and women, historically it has disproportionately affected women, since it is often related to the social expectations of gender roles within the family. In most societies, women are attributed the role of primary caregivers in

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[49] See: Discrimination (Employment and Occupation) Convention, 1958 (No. 111), Art. 5.
[50] ILO Workers with Family Responsibilities Convention, 1981 (No. 156).
[51] Workers with Family Responsibilities Convention, 1981 (No. 156), Preamble.
[52] See: Bronstein, *International and Comparative Labour Law*, 126–7.
[53] See: ILO Workers with Family Responsibilities Recommendation, 1981 (No. 165), para. 16.
[54] See: International Labour Organization, *Achieving gender equality at work*, para. 101.
[55] See: International Labour Organization, para. 95.
[56] International Labour Organization, *Equality in Employment and Occupation: Special Survey*, para. 37.
[57] See: International Labour Organization, *Achieving gender equality at work*, para. 102.

the family, either due to gender-based social attitudes or because women generally earn less than men, making it easier for them to stay at home without significantly impacting the family income if they need to stop or reduce work to fulfil care responsibilities. Discrimination based on family situation and family responsibilities is closely linked to discrimination based on sex because the family situation and responsibilities of women particularly affect their employment, advancement and overall position in the world of work. This mainly derives from the unequal distribution of unpaid care work in the household, including childcare and looking after other family members, which is at the same time linked to social and gender norms that shape the intra-household division of labour. The lack of policies and services aimed at redistributing of unpaid care work also disproportionately places family responsibilities on women.[58]

d. Sexual harassment

Although women are primary victims of sexual harassment, cases of men being harassed by women and same-sex harassment have also been reported.[59] While the Convention No. 111 does not expressly mention sexual harassment as a form of discrimination, the CEACR has interpreted that it is included in Article 2. This article requires ratifying states to adopt a national policy aimed at to promoting equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.[60] To be considered sexual harassment in employment, an act must be justly perceived as a condition or precondition for employment, or influence employment-related decisions, and/or affect job performance. Sexual harassment may also occur in environments that are generally hostile to one sex or the other.[61] In this regard, sexual harassment can take two forms: "quid pro quo" sexual harassment and "hostile work environment" sexual harassment. On the one hand, "quid pro quo" sexual harassment includes "any physical, verbal or non-verbal conduct of a sexual nature and other conduct based on sex affecting the dignity of a person, which is unwelcome, unreasonable and offensive to the recipient; and a person's rejection of, or submission to, such conduct is used as a basis for a decision related to employment or occupation". For example, requesting sexual favours (for oneself or a third person) from a job candidate in exchange for a job appointment. On the other hand, "hostile work environment" sexual harassment includes conduct that creates an intimidating, hostile or humiliating working environment for the recipient. For

[58] See: International Labour Organization, para. 94, 98.
[59] See: Bronstein, *International and Comparative Labour Law*, 163.
[60] See: Bronstein, 164.
[61] See: International Labour Organization, *Equality in Employment and Occupation: Special Survey*, para. 39.

example, making sexual jokes or remarks.[62] It should be noted that CEACR has pointed out that there is a crucial distinction between "quid pro quo" sexual harassment and "hostile work environment" sexual harassment. While "quid pro quo" sexual harassment is usually directed to a particular person and involves a reciprocal but coercive exchange following the pattern "this for that" (a person's rejection of, or submission to, sexual harassment is used in exchange for a decision affecting his/her employment, i.e. the victim's response to the harassment directly or indirectly impacts employment decisions); "hostile work environment" sexual harassment may involve situations in which the behaviour is not directed at a particular individual, do not include a coercive exchange, or is more subtle in nature (not related to a decision affecting the victim's employment).[63]

One of the challenges in defining and prohibiting sexual harassment in employment and occupation is the personal scope of the respective provisions. The CEACR points out that limited definitions of who can be perpetrator of sexual harassment hamper the full coverage of the different dynamics of its occurrence. Regarding the victims, the CEACR notes that some provisions only address sexual harassment against women, i.e. while women are often disproportionately affected by sexual harassment, protection against this phenomenon should extend to both men and women. Additionally, in some countries, sexual harassment is only prohibited in certain stages of employment and occupation, such as entering an employment relationship or termination of employment. The CEACR emphasized that to effectively tackle and put an end to all forms of sexual harassment in employment and occupation, it is crucial to have clear and comprehensive legal provisions aimed at preventing, prohibiting and addressing sexual harassment in order to protect all workers, men and women, and cover harassment perpetrated by a person in a position of authority, a colleague, a subordinate or by a person with whom workers have contact as part of their job, such as a client, supplier, etc. The scope of protection against sexual harassment should cover all workers, with respect to all spheres of employment and occupation.[64] Convention No. 190 and Recommendation No. 206 recognize that in the reality harassment can occur outside traditional physical workplace and still be considered as prohibited work-related behaviours. As work is increasingly performed in various settings and under different modalities, including through technology, these instruments are aimed at ensuring protection in all places or circumstances related to work.[65] Convention No. 190 particularly addresses harassment in the world of work occurring in the course of, linked with or arising out of work, for example, through work-related communications, including those enabled by information

[62] See: International Labour Organization, *Violence and harassment in the world of work*, 12; International Labour Organization, *Achieving gender equality at work*, para. 112.
[63] See: International Labour Organization, *Achieving gender equality at work*, para. 115.
[64] See: International Labour Organization, para. 116.
[65] See: International Labour Organization, *Violence and harassment in the world of work*, 21.

and communication technologies.[66] Sexual harassment through information and communication technologies includes for example, text messages, images, videos, phone calls, emails, websites, online chat rooms, online forums and social media, which can be used to target particular individual or group.[67]

e. Sex-based and gender-based harassment

The distinction between "sex-based harassment" and "gender-based harassment" is that "sex-based harassment" is defined as "harassment based on sexual characteristics", whereas "gender-based harassment" is defined as "harassment based on socially constructed roles and responsibilities assigned to a particular sex".[68] Convention No. 190 addresses gender-based harassment, which is a broader concept that includes sexual harassment. The notion of "gender-based violence and harassment" refers to violence and harassment directed at persons due to their sex or gender, or that disproportionately affect persons of a particular sex or gender, and includes sexual harassment.[69] It is also worth noting that the preparatory work for Convention No. 190 and Recommendation No. 206 also refer to gender-based harassment as being "directed at men or women because of their gender".[70] Gender-based harassment may target pregnant workers, workers returning from maternity, paternity or parental leave, or those with family responsibilities. For example, in Japan, "maternity harassment", or the practice of harassing a woman due to pregnancy, childbirth or a medical condition related to pregnancy or childbirth is known as matahara.[71]

IV. Conclusion

The substantive scope of Convention No. 111 covers all occupations and all jobs in both the public and private sectors. It does not only address access to wage-earning employment, but also to self-employment. Regarding the personal scope of application, the objective of this Convention is to protect all persons against discrimination in employment and occupation. There is no provision in this international labour standard which restricts its scope to individuals, groups or certain categories of workers. Therefore, all workers (including domestic, casual, seasonal, agricultural and migrant workers) must be protected against discrimination. Their exclusion from the scope of application of general labour law means that they are indirectly discriminated against.

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[66] See: ILO Violence and Harassment Convention, 2019 (No. 190), Art. 3 (d).
[67] See: International Labour Organization, *Achieving gender equality at work*, para. 117.
[68] International Labour Organization, para. 118.
[69] See: ILO Violence and Harassment Convention, 2019 (No. 190), Art. 1 (1) (b).
[70] International Labour Organization, *Achieving gender equality at work*, 58, footnote 314.
[71] See: International Labour Organization, para. 119.

The CEACR pointed out that the definition of discrimination in employment and occupation includes all types of discrimination, including direct and indirect discrimination, discrimination-based harassment, multiple discrimination, intersectional discrimination, other specific types of discrimination, as well as sexual harassment.[72] The CEACR has noted that indirect discrimination is a more subtle and less visible type of discrimination and has emphasized the importance of clearly defining and prohibiting it in order to achieve gender equality.[73]

Regarding discrimination-based harassment, the Convention No. 190 and Recommendation No. 206 should be seen as complementary to Convention No. 111 and Recommendation No. 111. In respect of multiple and intersectional discrimination, the key difference between these notions is that multiple discrimination refers to discrimination based on a multitude of discriminatory grounds or multiplicity of discriminatory grounds, which are not inextricably linked, i.e. one or more prohibited grounds are only an addition to another, while intersectional discrimination refers to discrimination based on several grounds, which are simultaneously and inextricably linked. The CEACR has also noted other specific types of discrimination that are increasingly prohibited in national legislations as severe or serious types, such as discrimination by association, discrimination based on presumed grounds, structural discrimination, segregation, denial or lack of reasonable accommodation, incitement, instruction or encouragement to discriminate against, and repeated or prolonged discrimination.

Discrimination based on sex includes differences that are directly or indirectly related to sex. Pregnancy and maternity, civil and marital status, family status and family responsibilities, as well as sexual harassment as a serious manifestation of discrimination based on sex, are included in the concept of "sex" as a prohibited discriminatory ground, which has evolved for that purpose. Discrimination based on sex also includes discrimination based on gender, since the understanding of discrimination based on sex has evolved to encompass the concept of gender, understood as socially constructed roles and responsibilities assigned to a particular sex. In this regard, the CEACR confirmed that discrimination based on sex goes beyond differences based on biological characteristics (i.e. sex) and also includes unequal treatment arising from socially constructed roles and responsibilities assigned to a particular sex (i.e. gender).

Discrimination based on maternity, including pregnancy, is the most evident form of discrimination based on sex. The CEACR has addressed pregnancy testing as discrimination based on sex in the context of its examination of Convention No. 111. The terms civil status, marital status, family situation and family responsibilities are not defined and not prohibited as discriminatory grounds by international labour standards. However, it is

[72] See: International Labour Organization, para. 73.
[73] See: International Labour Organization, para. 61.

considered that discrimination based on family responsibilities is addressed in Convention No. 156 because one of the reasons for its adoption is the need for additional standards in order to overcome the shortcomings of Convention No. 111.

While the Convention No. 111 does not expressly mention sexual harassment as a type of discrimination, the CEACR has interpreted that it is prohibited under the Convention. Sexual harassment can take two forms: "quid pro quo" sexual harassment and "hostile work environment" sexual harassment. It is worth noting that CEACR has pointed out that there is a crucial distinction between these two forms.

With regard to "sex-based harassment" and "gender-based harassment", the difference between them is that "sex-based harassment" means "harassment based on sex characteristics", while "gender-based harassment" means "harassment based on socially constructed roles and responsibilities assigned to a particular sex". The second one can target pregnant workers, or workers returning from maternity, paternity or parental leave, or those with family responsibilities.

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