Equality for Women in Employment:
An interdepartmental project

Enforcement of equality provisions for women workers

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Note: The IDP Women Working Papers are preliminary documents circulated informally in a limited number of copies mainly to stimulate discussion and to obtain critical comments.

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Preface

This working paper, on *Enforcement of equality provisions for women workers*, by Constance Thomas and Rachel Taylor, examines, inter alia, the different mechanisms for the enforcement of equality provisions. It assesses the effectiveness of these mechanisms in two main ways: the intended beneficiaries' capacity to invoke the mechanisms in a judicial process; and the mechanisms' ability to produce their intended results. The paper also reviews the roles of labour inspection, equality commissions and ombudsmen. In addition, it considers the enforcement of collective bargaining agreements and also the constraints faced in enforcement of equal pay provisions. Furthermore, the paper provides relevant information, from international labour standards, on enforcement.

In preparing this paper, the authors received valuable comments from Christine Elstob. This study is an integral part of the ILO's Interdepartmental Project on Equality for Women in Employment, which is a multidisciplinary project geared to examining some of the critical issues concerning equality for women in employment with a view to generating relevant data for the planning of future action.

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I. Introduction

Provisions prohibiting discrimination or guaranteeing equal rights on the basis of sex have been adopted in almost every country of the world. These provisions range from general statements contained in national constitutions to specific articles found in labour codes, employment acts or other labour-related regulatory instruments. In a growing number of countries, specific legislative acts addressing sex-based discrimination or the promotion of equality for women have been adopted. Equality clauses are also increasingly being included in collective agreements.

These legal provisions have contributed to many of the gains made by working women during the last 25 years. Nevertheless, discrimination against women in the workplace persists. Equal opportunity in the labour market has not been achieved and has even worsened in periods of economic recession. This harsh reality has prompted many countries to re-examine their legislative provisions and to subsequently amend them, extend their scope, repeal discriminatory provisions and attempt to increase penalties and sanctions. While the importance of formulating and adopting improved legislative texts should not be underestimated, it is their practical application which poses the greatest future challenge.

How legal provisions are (or can be) best implemented is a multifaceted question to which there is no simple answer. Practical application can be accomplished through a variety of means, including educational measures, training, legal literacy programmes, positive action, and enforcement measures. All of these tools need to be pursued simultaneously so they are mutually reinforcing. This study, however, focuses on the enforcement aspect of legislative implementation.

To be fully effective, legal provisions must be enforceable. In other words, national or other authorities must be able to order or compel compliance with the rights and obligations set forth in legislation. This study looks at various aspects of enforcement such as the access to justice, procedures, sanctions and remedies. Typical national mechanisms used to enforce anti-discrimination provisions include: administrative investigation and enforcement actions, litigation by groups or individuals who have claims of discrimination, litigation by government agencies, collective bargaining, and, to some extent, governmental incentive policies.

As a preliminary comparative study, this working paper is intended to highlight those aspects of enforcement which are key to improving the application of equality provisions. The paper does not serve as an exhaustive review of all enforcement mechanisms nor does it produce an in-depth analysis of their effectiveness. It is meant to prompt further research and debate on how enforcement mechanisms, procedures and remedies can more effectively promote application of the principle of equal opportunity and treatment between men and women at work. It is also intended to focus minds on when, and in what type of actions, it is most effective to use enforcement mechanisms as compared to other means of promoting equality.

In this paper, enforcement mechanisms will be reviewed for effectiveness in terms of (1) the ability of intended beneficiaries to invoke the mechanisms in a judicial process and (2) the ability of the mechanisms to produce their intended effects through deterrence. Individual enforcement mechanisms also will be reviewed from the perspective of individual versus group justice theories. Individual justice theory considers whether the legal provisions can be enforced in a way that is fair to the individual complainant by redressing the discriminatory treatment individually experienced. This theory is consistent with a view "that the aim of anti-discrimination law is to secure the rectification of discrimination by eliminating from decisions illegitimate considerations based on gender which have harmful
consequences for individuals”. This model is limited by its failure to take into account the more complex institutional aspects of discrimination which go beyond individual actions and relief. By contrast, the group justice perspective looks at the position of women as a whole and is more concerned with redistributive results and institutional changes, such as those achieved in affirmative action, rather than individual actions.

Despite use of these indicators, bright line distinctions between ineffective and effective mechanisms are rarely present. Clearly the judicial process is ineffective when a woman cannot invoke a law against employment discrimination because she is legally considered to be a minor without the legal authority to bring a claim. Assessment of effectiveness and adequacy is more difficult in a situation where a woman successfully pursues a discrimination claim in court, receives her court costs and a token amount of compensatory damages, but fails to obtain the job which she was wrongfully denied. Is the claimant’s favourable judgement sufficient to act as a deterrent to the continuation of the discriminatory conduct? Will women as a group benefit from this action? Is the remedy adequate in light of the time, effort and money put into the pursuit of the claim?

In-depth research into these areas at the national level can produce information useful to comparative studies at the regional or international level. The need for such study is evidenced by the paucity of existing information on the subject and by the actions undertaken by some countries over the last few years to amend procedural and penalty sections of their labour or equality legislation in the obvious hope of strengthening their enforcement capabilities. The various efforts undertaken in this area by countries such as Australia, India, the Philippines, the United Kingdom and the United States illustrate that countries have identified the need to make the enforcement of equality provisions more effective, but are their efforts hitting the mark? Christopher McCrudden has recently summarized the limitations in the effectiveness of European equality laws to be as follows:

- the inadequacy of institutional assistance to, and representation of, individual litigants;
- the need to pay extensive costs to commence and complete litigation successfully;
- the lack of trained and motivated lawyers;
- the inadequacy of remedies provided, both to compensate the individual fully in financial terms, and to ensure that the individual victim secures the benefit discriminatorily denied her;
- the inadequate knowledge of EC law principles by representatives and judges;
- the difficulty of proof of discrimination;
- the difficulty, specifically, of lack of adequate information being made available to an actual or potential plaintiff;
- the delays in the operation of the judicial process leading effectively to denial of individual justice;
- the lack of involvement by unions in addressing equality issues;
- the absence of mechanisms for tackling institutional (indirect) discrimination directly;
- inadequate settlements;
- remedies and sanctions which are addressed only to the individual plaintiff and not generalized to the class affected;
- the absence of adequate aggregate information on employer’s pay or workforce composition by sex;

— lack of public bodies with a specific equality mandate to adopt a strategic approach to enforcement rather than an ad hoc reactive approach;
— understaffed, ill-equipped, badly resourced, or poorly led special enforcement bodies;
— inadequate opportunities to challenge discriminatory collective agreements.²

This paper briefly reviews the functions of the administrative bodies of labour inspection, equality commissions and ombudsmen offices which have enforcement and supervisory powers over equality provisions. It then addresses the issues involved in the judicial review of employment discrimination or equal pay complaints, including aspects such as accessibility, legal representation, costs, burden of proof, length of time involved, and available remedies or sanctions. On this last point, the use of criminal sanctions, as compared to civil and equitable remedies, is discussed. The paper also looks at the enforcement of collective bargaining agreements and the difficulties encountered in enforcement of equal pay provisions.

II. What do international labour standards say about enforcement?

The principal ILO instrument concerning the elimination of sex discrimination and the promotion of equality is the Discrimination (Employment and Occupation) Convention, 1958 (No. 111). Over 100 countries have ratified the Convention, thereby committing themselves to its implementation at the national level. The Convention requires governments to adopt a national policy which prohibits discrimination and promotes equal opportunity and treatment in employment and occupation. It requires the enactment of legislation and the promotion of educational programmes necessary to secure acceptance and observance with the policy. It further requires the repeal of any statutory provisions and the modification of administrative instructions or practices which are inconsistent with the policy.

Convention No. 111 leaves it to the national authorities to determine how legislation should implement and enforce national policy. While the Convention itself is silent on enforcement measures, its accompanying Recommendation concerning discrimination (No. 111), urges that appropriate agencies be established to receive, examine and investigate complaints of non-compliance. These agencies should be able, through conciliation or other means, to "secure the correction" of those practices which conflict with national policy. The agencies should be able to render opinions or issue decisions on the manner in which identified discriminatory practices should be corrected. Unlike the Convention, the Recommendation's provisions are not binding. Their purpose is to enhance countries' understanding of the Convention's requirements and to facilitate its application.

The ILO Governing Body has approved certain report forms for governments to use in fulfilling their reporting obligations on ratified Conventions in accordance with the ILO Constitution. The report form for Convention No. 111 includes questions on enforcement. Part III of the report form asks governments to indicate the authorities entrusted with implementing the Convention as well as the methods by which its implementation is supervised and enforced, including information on labour inspection. The report form also requests information on whether courts of law or other tribunals have decided issues related to the Convention.

Like the Discrimination Convention, the terms of the Equal Remuneration Convention, 1951 (No. 100) allow for its application to be determined at the national level. This may be done through collective agreements, laws and wage-fixing machinery. Again, nothing is mentioned about enforcement or the handling of alleged violations. The accompanying Recommendation No. 90 suggests, however, that investigations be undertaken which promote the application of the equal remuneration principle. Moreover, the report form for Convention No. 100 seeks information on responsible national authorities and their methods for ensuring that relevant legislation is supervised and applied. It also asks about court or tribunal decisions issued on the subject.

Based on the relevant Recommendations and report forms, it may be logically inferred that effective enforcement mechanisms are essential to the full implementation of the anti-discrimination and equal remuneration principles contained in Conventions Nos. 111 and 100. In the future, consideration may be given to providing more explicit guidance on the
enforcement of these provisions as found in the Termination of Employment Convention 1982 (No. 158).\(^2\)

In contrast to the lack of detailed enforcement provisions which characterizes the Discrimination and Equal Pay Conventions, the Termination of Employment Convention describes at length procedural protection and rights of appeal that should be available for wrongful termination of employment. For example, it provides that a worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal to an impartial body which should be able to render decisions, e.g. a court, labour tribunal, arbitration committee or arbitrator. It further provides that the worker should not have to bear alone the burden of proving that termination was not justified. Instead, the burden of proof may be placed on the employer or some other means may be used which allows the impartial body to reach a decision on the evidence presented. The Convention also requires that certain remedies be made available to claimants such as reinstatement, adequate compensation or other appropriate relief.

Enforcement of labour laws through labour inspection is addressed by several ILO Conventions on labour inspection. It is in this area where the ILO has focused attention on enforcement. The principal Convention on Labour Inspection, 1947 (No. 81) provides that workplaces shall be inspected as often and as thoroughly as is necessary to ensure effective application of the relevant legal provisions. The provisions covered by the Convention relate to conditions of work and the protection of workers. These terms of reference are very broadly defined and thus may include protection against discrimination in the workplace.

\(^2\) Convention No. 158 concerning termination of employment at the initiative of the employer provides that race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin shall not be considered valid reasons for termination.
III. Administrative bodies to supervise and/or enforce compliance with the legislation

A. Labour inspection

In the vast majority of countries, labour inspectorates have been established to ensure the observance of legal provisions in the working environment. These labour inspection systems (1) secure the enforcement of laws and regulations relating to conditions of work, labour relations, contracts of employment, and the protection of workers while engaged in their work, (2) supply technical information and advice to employers and workers, and (3) bring to the attention of the competent authority any defects or abuses not covered by existing legal provisions. In many countries a general labour inspectorate covers all branches of activity, including industry, commerce and agriculture. In other countries, separate systems are established for each activity. Either way, it can be said that most salaried employees and apprentices are subject to labour inspection.

Even though labour inspectorates are often associated with the enforcement of legal provisions concerning payment of wages, hours of work, and health and safety conditions, their enforcement powers generally cover all labour laws and regulations and may cover certain aspects of labour relations. In most countries, labour laws contain some sort of prohibition against sex discrimination in employment. Labour inspectorates have the power to supervise and enforce employers' compliance with sex discrimination provisions and other protective legislation. The question is, to what extent do labour inspectors use their powers to address gender discrimination in carrying out their wide range of functions?

1. Powers of labour inspectors

As a general rule, labour inspectors have the power to enter premises where work is being performed, review documentation and question employers, supervisors, managers and employees. This regular investigative authority enables inspectors to obtain first-hand knowledge about and make on-site assessments of the terms and conditions of work. Cooperation with the labour inspectors is usually mandated by law and refusal to cooperate with them may lead to sanctions. Nevertheless, studies have shown that most inspectors do not tend to inspect establishments for violations of discrimination. The labour inspectorate's failings in this regard have been addressed in several jurisdictions. For example, a separate division of labour inspectors has been created in Ontario, Canada, to undertake inspections and improve enforcement of the legal provisions requiring pay equity between men and women.

Labour inspectors often have authority to deal with matters in the working environment that fall outside specific regulations. Even if equal pay provisions are not specified in the law, in many instances, labour inspectors during an inspection would be authorized to compare wages of men and women or compare work tasks where pay differentials give the appearance of being sex-based. In Malawi, ¹ if an individual complains to a labour officer, the officer is duty-bound to investigate the complaint and, where possible, effect a settlement whether or not there is actually legislation covering the point. In Spain, as a result of using their investigatory powers, labour inspectors discovered and corrected a situation where women were doing the same work as men under different job titles and at different salary levels.

¹ Malawi Employment Act, section 51.
In addition to their inspection functions, labour inspectors usually have general advisory powers. They frequently give advice, to both employers and employees, on matters concerned with legal rights and obligations. ILO Conventions Nos. 81 on Labour Inspection, 1947, and 129 on Labour Inspection (Agriculture), 1969, call upon the labour inspectorate to supply technical information and advice to employers and workers concerning the most effective means of complying with the legal provisions. Because this assistance function ensures the effective implementation of laws and regulations, it is interdependent with and complementary to the enforcement function. In France, a separate information unit has been set up in the inspectorate to facilitate the work of the service by providing the public with information on currently applicable regulations or contractual provisions. In Spain, some preliminary contacts and meetings have taken place between the Institute of Women and the labour inspectorate with the aim of establishing such an information section concerning women workers. It would seem in these situations that labour inspectors could be very influential in promoting compliance with discrimination provisions. Of course the ability to make good use of this advisory function presupposes a knowledge of discrimination issues and anti-discrimination policies which many labour inspectorates do not possess. In this regard, collaboration with national machinery on the status of women could be mutually beneficial. In Belgium, the labour inspectorate has received training on equality issues.

In accordance with Conventions Nos. 81 and 129, labour inspectors should also make recommendations on the improvement of existing laws and regulations, and notify their supervisors of any shortcomings in existing provisions. While this function appears to be accepted in principle, a review of available labour inspection reports indicates that labour inspectors are not often able to fulfil this function in practice. In short, information apparently has not been reported on possible flaws in anti-discrimination provisions.

The enforcement powers of labour inspectors fall roughly into two categories: (1) the authority to bring violations (or suspected violations) to the attention of some higher administrative authority and/or to initiate proceedings to deal with such violations; and in some areas, (2) the power to undertake conciliation and arbitration proceedings (this latter function is a controversial subject). When suspected violations arise, the labour inspectors usually must refer the matter to a court, or to the appropriate authorities. In the Central African Republic, for example, inspectors can bring to the Minister’s attention deficiencies or abuses which are not specifically covered by existing regulations. Specific procedures govern the handling of matters involving recruitment, promotion, conditions of employment and dismissal. Article 156 of the Labour Code enables the labour inspectors to go directly before the competent judicial authorities with infractions. The situation is similar in Ethiopia, where the labour inspectors are charged with the enforcement of sanctions as well as compliance with the laws and regulations. In Antigua and Barbuda it is the Labour Commissioner who receives questions, complaints, petitions, etc., and then investigates and attempts to conciliate. If conciliation is not possible, the matter is referred to the Minister of Labour who also tries to conciliate. If conciliation again is not possible, the Minister can refer it (1) back to the parties concerned for private negotiations; (2) to the proper authorities for prosecution, if this is indicated; or (3) to a formal officer for decision-making, pursuant to his authority to hear and decide complaints under the Labour Code.


3 ibid., paras. 99-102.


The number of enforcement actions taken by labour inspectors in matters involving sex-based discrimination seem to be few, although little information is available upon which to verify this assessment.

2. General constraints on labour inspectorates

In order to assess the potential effectiveness of labour inspectorates in the area of discrimination, the constraints placed on the labour inspections systems must be taken into consideration. In many countries labour inspectorates may not be utilized to their full potential due to restricted funding or the lack of an efficient infrastructure, and the consequent problems of poor communications and transport capabilities. A good example of this can be seen in Indonesia, where it is reported that most of the legislative enforcement burden falls on the labour inspectorate. Unfortunately, in the entire country, there are only 1,133 inspectors who have to cover over 140,000 registered enterprises; and in Jakarta, there are only 100 inspectors for 20,000 enterprises. The inspectors (due to lack of resources) have been forced to concentrate on only those enterprises with 50 or less employees; the rationale being that these are the places where enforcement is probably the most lax. Transportation costs are not built into the budget, which makes inspection of enterprises in remote areas, where large concentrations of women work, very difficult. The inspector to enterprise ratio is even worse in other countries.

In addition to having limited human resources, many labour inspectorates are overburdened with diverse responsibilities. This results in labour inspectors not being able to spend a sufficient amount of their time on enforcement activities in general, let alone the specific enforcement of equality provisions.

Another limitation on available human resources concerns the level of training of the labour inspectorate. They can only be effective in areas in which they have expertise, and most do not have expertise in the area of identifying and preventing discrimination, especially indirect forms of discrimination.

3. Application of discrimination laws

Unfortunately, information is not available which could allow an analysis as to how often labour inspectorates use their power to bring about compliance with discrimination laws. The Committee of Experts found in their 1988 General Survey on Equality in Employment and Occupation that “very little information was received from governments on the specific action of labour inspectors in the effective application of provisions concerning equality”. In 1990, an ILO report on equality found that such information still was lacking. Nevertheless, that report pointed out that the potential for labour inspectors’ participation in the enforcement of discrimination provisions is considerable because of their regular contacts with employers and workers at workplaces. An ILO tripartite symposium on equality in 1990 concluded that the services of labour inspection should be strengthened through training programmes and increased resources so as to be able to exercise a greater role in the enforcement of the relevant provisions.

Rather than emphasize the equality aspects of the regulations, some of the labour inspectorates focus on the protective provisions for women, e.g. prohibitions against night work and dangerous or arduous work. This approach follows the somewhat outdated

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6 ILO: A comprehensive women’s employment strategy for Indonesia, final report of an ILO/UNDP TSSI mission, Regional Office for Asia and the Pacific, Bangkok, June 1993, p. 96.
approach used in earlier Labour Codes and Factories Acts which were designed for the "protection of women and children". While the protection against hazardous working conditions is important for both men and women, the protection against discrimination should not be eclipsed by this other orientation.

Recognizing that full use has not been made of labour inspectorates in the area of anti-discrimination enforcement, certain governments are strengthening their inspectorates in this regard. In Belgium the labour inspectorate has undergone training on the enforcement of equality laws. In Greece the equal treatment legislation calls for equality offices to be set up in all the labour inspection services to supervise the Act's application. In some countries, coordination between the labour inspectorate and the specialized agencies on the status of women has raised awareness among labour inspectors regarding discrimination issues. In Portugal, the labour inspectorate must first obtain the opinion of the Committee on Equality in Work and Employment when questions arise concerning the existence of discriminatory situations or practices. This type of collaboration should be encouraged as a method of improving enforcement.

It may be that the use of the inspectorate for discrimination enforcement might, in some cases, reduce the need to use court procedures. Alternatively, where court procedures are followed, the inspectorate could ensure that complainants have some form of support. If properly exercised, inspectors' advisory functions and their ability to disseminate information could also be very effective in helping prevent discrimination. Their investigative functions could allow for more direct contacts with complainants and could help obtain the perspective of a group of employees rather than just an individual complainant. Thus, despite the constraints on the labour inspection systems, their potential contribution in this increasingly important area of workers' rights could be effectively utilized to the benefit of both employers and workers.

The extent of the labour inspectorate's involvement in enforcing discrimination laws should be researched. Training in equality and discrimination matters should be supported. Finally, methods for strengthening cooperation between national machinery for women and labour inspectorates should be encouraged and if possible systematized.

B. Specialized enforcement bodies

In keeping with the provisions of Recommendation No. 111, a number of countries have established specialized enforcement agencies to promote compliance with non-discrimination legislation. In some countries, such as the United Kingdom, the agency only covers gender discrimination. In other countries, such as the United States and Australia, the commissions cover various groups including women. Some commissions are limited to employment discrimination and others cover all forms of discrimination. The scope of the agency's coverage usually parallels the scope of the legislation which they are established to enforce. The agency with a women-only focus has the advantage of becoming very specialized in all aspects of gender discrimination. On the other hand the agencies which cover various grounds of discrimination, such as race and sex, have the advantage of more realistic evaluation of reasons for discrimination. For example, for many ethnic women discrimination is both race and gender-based.

Generally speaking, these agencies have the power to receive individual and, where permissible, group complaints alleging violation of employment discrimination laws. They also undertake investigations, assist in conciliation and make findings or recommendations. In some countries the agencies have authority to initiate complaints and investigations themselves. In other words, they need not rely solely on individual complaints to trigger their enforcement powers. Ideally, agencies should be authorized to do both — handle individual
complaints as well as initiate their own actions. In some countries such as Spain, these agencies may also render expert advice in discrimination cases in the courts.9

The purpose of the agencies is to assist victims of discrimination in the handling and resolving of their complaints in an informal, inexpensive, efficient and understanding manner. The procedures for the filing and pursuit of claims are much less rigid in such agencies than in court cases. In theory, they should be user-friendly and operate to facilitate application of the law. Services of the agency are usually free of charge and do not require legal representation. Discrimination law is recognized as being an extremely complex area of law often involving cases that are very difficult to prove. The handling of complaints by the agency which has specialized knowledge in the field is perhaps the greatest contribution they have to offer. The agency has the advantage of possessing an expertise in the subject of employment discrimination which, in many countries, both public and private attorneys lack.

In some countries such as the United States, claimants are required to file a claim with the Equal Employment Opportunity Commission and wait six months before they may file a case in court under the Federal Civil Rights Act. This filing requirement has been criticized for delaying rather than expediting the resolution of discrimination claims because the EEOC is often unable to take any action. On the other hand, when the EEOC does decide to initiate a claim on its own, or perhaps on behalf of the complainant, it has experienced a fairly high success rate.

Limitation on the authority of specialized agencies can frustrate their effectiveness. For example, in Norway, the Equal Rights Board cannot challenge a collective agreement as such: that must be done before the Labour Court, because only a party to the agreement can bring such an action (i.e. a trade union or employer’s confederation) and collective disputes go before the Labour Court. An individual can claim that her wages are unequal to those of a male worker because they are set in accordance with a collective agreement which is contrary to the Equal Rights Act, and this will indirectly raise the question of the agreement. The Equal Rights Board can adjudicate this individual complaint, but it will not have any effect on the agreement as such. The Board has no authority to extend its finding to all the other employees under the agreement who have the same conditions and unequal pay unless they challenge the discriminatory provision themselves.

The performance of these agencies has, in a few countries, failed to meet expectations. This has been due, primarily, to the excessive number of complaints, a lack of funding or lack of political will to support their enforcement actions. Nevertheless, the establishment of such specialized agencies is generally regarded as positive. For example, in the United Kingdom, an Equal Opportunities Commission was established under the Sex Discrimination Act of 1975. The Commission may undertake formal investigations and, on the basis of its findings, recommend changes in a person’s practices or procedures. It may also serve non-discrimination notices, requiring an employer to cease the commission of discriminatory acts. In cases of persistent discrimination, the Commission may apply to the appropriate court for an injunction to restrain the employer from committing such further acts. Its 1991 budget was about £5 million (the Commission for Racial Equality had three times as much). In 1991, it dealt with 17,363 inquiries, an increase of 900 over the year before. The biggest increase was in the employment field (3,552 of the inquiries were about employment, of which 427 concerned sexual harassment, and 1,130 maternity). The Equal Opportunity Commission granted legal assistance to complainants in 150 cases; 68 of these assisted cases reached the

Industrial Tribunal or the Employment Appeals Tribunal, of which 27 were settled, 23 were successful, and 18 were dismissed.  

Where such agencies or commissions do not exist, consideration should be given to their establishment. Staff should have specific expertise in subjects such as equal pay and sexual harassment. Given the information collected through the processing and hearing of complaints, these agencies would be ideally situated for providing policy advice to other government agencies and legislative bodies, particularly on legislative changes. For example in Belgium, the Commission for the Employment of Women has duties for rendering opinions, carrying out surveys or submitting proposals for legislation or regulations. In the United States the Equal Employment Opportunity Commission issues enforcement guidelines on how the law should be applied. These guidelines are used by the agency, and while they are not binding on courts, they have persuasive authority. In the United Kingdom the Equal Opportunity Commission has played a watchdog role by publicly denouncing the enforcement deficiencies in the law and procedures on equal pay.

Greater coordination among the specialized enforcement agency, other enforcement agencies and other national machineries on the status of women should also be encouraged. The relationship between the Office of the Ombudsman and the Equal Rights Board provides an interesting example of how different agencies can enhance and complement each others’ work. In Sweden there is an Equal Opportunities Ombudsman and an Equal Opportunities Commission. At the request of the Ombudsman, the Commission can order an employer to take specific measures to promote equality between the sexes at work, under the penalty of a fine if he or she fails to comply. Norway also has an Equal Rights Board and an Ombudsman. The Equal Rights Board cannot repeal or alter administrative decisions nor dictate how other authorities must exercise their power to make such decisions. It can, however, issue binding orders on administrative actions that are not dispositions. This includes the setting of wages (which is expressly not a disposition by statute) for both public and private sector employees. As in Sweden, the Ombudsman can submit questions to the Equal Rights Board for hearing.

The effectiveness of specialized bodies depends to a large extent on their mandate or authority as well as the adequacy of their financial and human resources. They should have the necessary power to obtain all the relevant evidence needed for decision-making in discrimination cases. Moreover, they should be accorded the necessary status for their decisions, whether recommendations or opinions, to be given due weight. Consideration may also be given to extending their powers. For example, it may be more effective for an agency to be able to undertake periodic compliance reviews of equality legislation rather than to be solely complaint-oriented.

C. The office of the Ombudsman

The Swedish office of the Ombudsman originated in 1713. Originally the office was established to supervise officials and to protect citizens from injustice. At present there are over 100 ombudsman offices or ombudsman-type institutions throughout the world. Over time, these offices have developed two primary roles: (1) investigator of faults in administration, and (2) provider of remedies where injustice is found. Ombudsmen also can offer an inexpensive, quick and simple avenue of redress for claimants who may have no

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10 United Kingdom country paper in A. Bronstein and C. Thomas.
11 Royal Order of 2 December 1974, section 2.
13 ibid., section 35.
other means available to correct wrongs. In this regard some of the specialized agencies described above have taken on an ombudsman-like character. Two characteristics regarded as vital to the Ombudsman office are independence and objectivity. These have been maintained despite the Ombudsman's status as a public official.

The jurisdiction of the Ombudsman varies from office to office. In some countries the office only covers the public service. For example in Trinidad and Tobago, the Ombudsman hears complaints from employees of statutory and local authorities, including allegations of discrimination. Over time many of the offices have taken on employment discrimination complaints. In Sweden, the Ombudsman's main functions are to ensure compliance with equality legislation and to participate in the promotion of equality. The services of the office are free of charge. Primarily, the Ombudsman has a duty to seek voluntary compliance. In disputes over infringement, the office should provide such support as the Ombudsman finds justifiable for employees and job applicants who are not represented by a trade union.

The Swedish Ombudsman may institute proceedings in the Labour Court, when it is judged that the dispute raises important issues of precedent. He or she may apply to the Equal Opportunities Commission for a fine to be imposed, in the event of an employer's failure to implement the measures ordered (as discussed above). In the period 1982-85, the Ombudsmans received 318 reports of gender discrimination (on average 90 per cent of the complaints were from women). These were mainly concerned with appointments or promotion, but an increasing number were concerned with supervision and the allocation of work duties, transfers, temporary dismissals and discharges. The majority of the reports submitted to the Ombudsman concerned public sector employees.

Norway also has an Ombudsman for Equal Rights, to whom most parties complain before making an application to the Court, though it is possible for an individual to apply directly to the Court. The Ombudsman has original capacity to dismiss complaints, but little formal authority. She can adjudicate but proceedings are usually less formal. She can open a hearing upon receipt of a complaint or at her own initiative. If the search for a voluntary solution is unsuccessful, the Ombudsman can submit the question to the Equal Rights Board for a hearing, which can make binding administrative decisions. The Ombudsman must basically follow the rationale of the Equal Rights Board.

In the Philippines, the office of the Ombudsman can undertake investigations on its own initiative or upon receipt of a complaint by any person. It can order someone to perform an act, correct an omission, etc., in order to ensure compliance with the law, or to stop abuse or impropriety, etc. The Ombudsman can recommend that an official (or an employee) at fault be removed, suspended, demoted, fined, censured, or prosecuted, and ensure compliance therewith.

The office of the Ombudsman appears to be an appropriate forum in many countries for discrimination complaints to be resolved. These offices would appear best suited to resolve individual complaints in an informal manner. They are perhaps less equipped to resolve complaints involving complex issues such as those presented in equal pay cases.

15 ibid., section 46.
16 ibid., section 35.
18 Norwegian Act respecting Equality between the Sexes, 19 February 1988, section 11.
D. Legal aid

Legal aid centres in many countries have enabled many women to invoke the protection of discrimination laws. Such centres often serve as an initial source of information about women's rights. They also provide legal counselling and may advocate on women's behalf. Such centres may be funded publicly or privately. In the United Republic of Tanzania, the Tanzania Media Women Association (sic), TAMWA 19 has helped to establish a Women's Crisis Centre for taking appropriate action against problems of beating, sexual harassment, discrimination, etc. The Centre has the support of women lawyers, who provide legal counselling, and also enjoys the services of social workers, journalists and other professionals. In Sri Lanka the Women's Bureau under the Ministry of Women's Affairs, which is responsible for the formulation of policy and its implementation, also has projects to increase legal literacy among women, and to increase their access to legal aid. 20

In countries where specialized commissions or Ombudsman offices do not exist, the role of legal aid offices to assist in the enforcement of laws is even more important. The question is the extent to which such centres have developed the expertise needed to adequately represent claimants, particularly women, in employment discrimination cases.

IV. Judicial action

A. Types of cases brought and outcomes

Although statistics are limited, it would appear that the most common types of complaints about gender discrimination in employment include actions of dismissal, promotion, equal pay, sexual harassment, job advertisements, hiring and infringements on maternity protection, though the kinds of discrimination cases pursued vary between countries. In many countries the nature of the cases brought may depend as much on substantive legal provisions as on the available enforcement mechanisms. For example in some countries, hiring decisions cannot be challenged. Where they can be challenged, the rights to remedies are often nominal, causing individual claimants to feel such cases are not worth pursuing.

It may be said that the reported rates of success for all types of discrimination cases are often low. In Israel, under the section of the Equal Opportunities Law of 1988 forbidding discrimination in job advertisements, 500 cases were dealt with in 1989, of which 35 resulted in convictions and fines by the Labour Courts. In 1990, 600 such cases were dealt with, of which 30 resulted in convictions and fines.

The few actual discrimination cases reported in Hungary are concerned mostly with pregnancy and maternity. Not only is the volume of cases low, but it is actually decreasing. On the other hand, Spanish court cases, which have been few, are on the increase. The most common cases concern equal pay and dismissals. The number of court cases has apparently increased in Germany. Most of the cases address equal pay, and they are normally successful. The discrimination case figures for the United Kingdom Industrial Tribunals are shown in the table below.

<table>
<thead>
<tr>
<th>Year</th>
<th>Total number of cases</th>
<th>No. of successful cases</th>
<th>No. of unsuccessful cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>1986-87</td>
<td>612</td>
<td>48</td>
<td>129</td>
</tr>
<tr>
<td>1987-88</td>
<td>691</td>
<td>46</td>
<td>142</td>
</tr>
<tr>
<td>1989-90</td>
<td>1,046</td>
<td>86</td>
<td>176</td>
</tr>
<tr>
<td>1990-91</td>
<td>1,078</td>
<td>78</td>
<td>188</td>
</tr>
</tbody>
</table>

1 Country report on the United Kingdom, Proceedings of the European Labour Court Judges Meeting, Brussels, 1993 (in publication). The remainder of the cases not shown in the table were either not heard for lack of jurisdiction, settled or withdrawn.

While the number of cases is clearly increasing (albeit slowly) the success rate for applicants remains low as does the overall number of cases which are actually being heard.

Equal pay claims before Industrial Tribunals in the United Kingdom show a different trend.

1 Government report to the ILO on Convention No. 100, 1990.
2 Hungarian country report in A. Bronstein and C. Thomas.
3 Spanish country paper in A. Bronstein and C. Thomas.
4 German country paper in A. Bronstein and C. Thomas.
The factors which probably have contributed to the drop in the number of claims include the severe recession which has gripped the United Kingdom for the last few years, the appalling low success rate experienced by claimants as well as the difficult and lengthy procedures which must be followed in such cases.

Australian figures at the federal level show that the number of complaints is increasing. In 1987-88, there were 193 on discrimination, 121 on sexual harassment, and 41 on pregnancy. For the period 1989-90, there were 212 on discrimination, 140 on sexual harassment, and 83 on pregnancy, whilst in 1990-91, there were 239 on discrimination, 292 on sexual harassment, and 156 on pregnancy.

B. Initiation of complaints by individuals

In the majority of countries gender discrimination is prohibited by law, in at least some form, and there is a system whereby legal redress can be sought. The mere existence of a right, however, does not mean that an individual can exercise that right in relation to her particular case: there may be certain procedural bars or obstacles to her bringing a legal action.

The nature of the complaint itself may prevent action. The court may not have jurisdiction to hear the complaint. In some countries a challenge cannot be made before the courts, by an individual, against a discriminatory provision in a collective agreement.

The individual herself also may lack standing to bring an action. In South Africa, a woman is not protected by the legislation until she is actually hired. Except a woman has actually entered employment, she may not make use of the unfair labour practices remedy because she is not covered by the Industrial Relations Act (under which the remedy is provided). There may also be legal requirements to be fulfilled before a woman is legally considered an “employee”: for example, in the United Kingdom, the length of continuous service an individual has performed is relevant. This is a particular problem for part-time and temporary workers. An individual might also be expressly excluded from certain legislation. In Germany, the Labour Code expressly excludes public sector workers who enjoy only constitutional protection. Time limitations placed on the filing of complaints may also prevent the right to file an action in a court or tribunal.

Japanese law illustrates another problem related to the basic right of an individual to bring an action. The Equal Employment Opportunities Law 1985 provides that employers “should endeavour” to give equal opportunities in recruiting, hiring, assigning tasks and

1 The Labour Relations Act, 1956, section 24.

4 Japanese law respecting the improvement of the welfare of women workers including the guarantee of equal opportunity and treatment between men and women in employment, 1 July 1972 (as amended 1 June 1985).
promotion. Thus the law merely imposes a duty to strive for adherence, rather than a strict prohibition or a requirement to achieve a certain level of equality. This type of standard is essentially promotional making a violation very difficult to prove. The emphasis is on the intention of the employer rather than on the cause or act of discrimination and its impact on women. This must surely limit the possibility of using judicial action to enforce the provisions of this law. This result may have been intended as the enforcement mechanisms set out under the law are limited to administrative guidance and mediation procedures.  

Once it has been determined that a complaint is justiciable, or in other words, that it may legally be brought, a host of other procedural obstacles face a claimant who wants to pursue her case to a successful conclusion. A number of these are discussed below.

1. Choice of forum for discrimination cases

An individual action to enforce rights may be brought in a number of different fora depending on the country, the legal system and the dispute resolution infrastructure. Allegations of employment discrimination may be brought before (1) an ordinary civil or penal court, (2) the supreme or high court, or (3) the constitutional court. Alternatively, in some countries, labour courts or industrial tribunals have jurisdiction over some or all labour or employment matters. A complainant may have a choice of venue, depending on the nature of the complaint, or possibly the remedy sought.

The diversity of fora makes an international comparative study of their relative effectiveness and efficiency extremely difficult. Nevertheless, significant questions have been raised about which is the best forum for discrimination cases. For example some have questioned whether labour courts are better or less equipped than civil courts to handle complaints of gender discrimination in employment. Should countries be encouraged to limit these actions to labour tribunals or, rather, to civil courts? In most instances, labour courts or industrial tribunals have a better general knowledge of labour relations and employment matters. That knowledge, however, is usually centred on the settlement of interest disputes arising out of collective agreements rather than disputes arising out of individual employment or civil rights. On the other hand, civil courts, which hear a variety of cases, may lack an appreciation for the nature of the employee-employer relationship and may have more formal procedures to follow.

Perhaps the answer to the “preferred-forum” query lies not in the type of court per se, but rather in whichever forum has developed the most expertise, experience and jurisprudence in the area of employment discrimination. For example in the United Kingdom, a complainant applies to an Industrial Tribunal which now has developed some knowledge of discrimination law by virtue of having heard a considerable number of such cases. In the United States, the Federal District Courts are regarded by many as having developed the greatest expertise and sophistication in the handling of discrimination complaints.

Expertise is not the only factor to be considered in evaluating the forum. Tribunals are often thought to be more efficient than courts, but that may not always hold true. It is reported that current proceedings in the Tribunals in the United Kingdom and Germany are very complicated and slow, requiring highly specialized practitioners. Thus, one of the possible advantages tribunals had over courts has now been negated. Tribunals, at least in the United Kingdom, were originally envisaged as a quicker and less formal method of settling disputes.

For the development of jurisprudence, many lawyers prefer to use constitutional courts whenever possible. A constitutional case also may have a greater degree of credibility, and possibly more far-reaching consequences for promoting equality for other people as well.

In discrimination cases, constitutional courts are often possible fora because prohibitions against discrimination are usually found in constitutions. In Bangladesh, article 44 of the Constitution¹ gives individuals the right to seek Supreme Court enforcement of certain "fundamental rights", including equality of opportunity, which are guaranteed by the Constitution. Constitutional cases also can be brought in Spain. In Bulgaria complainants can directly bring a constitutional case on employment discrimination in the Constitutional Court.

While it is important for national constitutions to state that constitutional rights are enforceable in courts of law, that does not always guarantee that the constitutional process is truly accessible. The Sri Lankan Constitution states that all persons are equal before the law, and there is to be no discrimination on the grounds of (inter alia) sex.⁹ The Constitution has made justiciable the infringement of any fundamental right by an executive or administrative authority, and such a violation can be pursued before the Supreme Court which can declare a violation and award compensation. This has, however, never happened since the Constitution came into force in 1978.¹⁰

Which courts are most appropriate for the handling of discrimination cases also depends on the remedies they can offer. A tribunal might not be able to impose criminal sanctions, for example, and a constitutional court almost certainly will not be able to do so. On the other hand, in the federal-state systems found in Australia, Canada or the United States, the preferred forum may depend on whether the law that offers the most protection against discrimination is state or federal.

Another factor which may influence a complainant's choice of forum is the nature of the adjudicatory process — does it seek conciliation or does it reward one adversary over another? The duty to conciliate is a feature common to a large number of countries. It may be preferable to attempt a settlement in the (presumably) friendlier surroundings of informal conciliation proceedings, but this forum may not in all cases produce the desired remedy. The Australians report that (1) conciliation generally slows the resolution of a complaint, (2) people are now being legally represented during conciliation proceedings (which rather defeats the purpose) and (3) the confidential nature of conciliation proceedings takes away the element of public censure (cases before the Commission or the courts frequently attract a great deal of publicity). Nevertheless, in many, if not most countries, emphasis is on conciliation over litigation. For equal pay cases in Jamaica, under the Equal Pay Act,¹¹ the parties must try mediation first. If the matter is settled at that point, the employer is not actually guilty of the breach (assuming he complies with the agreement). Such a provision presumably gives employers the incentive to settle before going to court.

The composition of the tribunal or court is also increasingly recognized as an important factor. In this regard it can be fairly estimated that most of the judges in the world are men. In Sweden's State report to the United Nations Committee on the Elimination of Discrimination against Women, the Equal Opportunity Ombudsman expressed dissatisfaction with composition of the courts in disputes concerning discrimination. It suggested that the panel should either be entirely male or entirely female for discrimination cases depending on the sex of the complainant.

² Constitution of Sri Lanka, 22 May 1975 (as amended 14 November 1987), article 12.
A report by the Judicial Council of California, entitled "Achieving Equal Justice for Men and Women in the Courts" addresses the issue of judicial attitudes. The report documents evidence of both overt and subtle forms of gender bias displayed by judges towards attorneys, litigants and court personnel involved in proceedings. The report makes the important point that "the appearance of justice is as important as justice",¹² and that "when pervasive bias by judges exists, as this report demonstrates, the system is not fulfilling its duty to assure equal justice under the law". The logical conclusion that can be drawn from such an in-depth report is that women, particularly in discrimination cases, may not get a fair hearing of their complaint under the present judicial structures. Concern over this, now documented, fact has probably contributed to the chilling of women's willingness to use the legal process to correct a violation of law. In a few jurisdictions, such as Australia, it is now required that women sit on certain tribunals in order to balance the gender composition.

Special types of fora may be available depending on the type of case. In India, the appropriate state government may appoint officers (with at least the rank of labour officer) to hear and decide cases on the non-payment of equal wages or any other complaint under the Act. They decide if work is of a similar nature, and can order payment or other action to ensure compliance with the law. They have the powers of a civil court for demanding documents, witnesses, etc.¹³

The Canadian Government created the Human Rights Tribunal to conduct inquiries into alleged contravention of the Canadian Human Rights Act. The Tribunal has jurisdiction over matters that come within the legislative authority of the Canadian Parliament, and hears complaints against federal government departments, crown corporations, banks, airlines, etc. The Human Rights Commission refers cases to the Tribunal but two independent Commissioners are responsible for investigation. The Tribunal is quasi-judicial and its hearings decide whether a complaint is substantiated. There is a right to appeal against any case (on interpretation of the law or facts). A complainant/appellant may go from the Review Tribunal to the Federal Court.

Frequently, the supervisory and enforcement mechanisms apply to private and public sector employees alike. Different avenues of recourse may however be available to public employees through public service commissions and tribunals. It is generally felt that public sector discrimination cases are easier on the whole to bring and resolve than are similar cases involving the private sector.

There are, of course, countries which have not set up any specialized machinery for the resolution of discrimination disputes, and where legal action must be taken through the ordinary courts. In Antigua and Barbuda, the only recourse available is an application for a declaration of discrimination and requested relief made to the High Court. Otherwise there is no right of appeal to a competent authority.

Regardless of the type of forum, it is important that a complainant be able to use the available forum expeditiously, inexpensively and with knowledge that the complaint will be fairly and knowledgeably determined with appropriate remedies and sanctions attaching.

¹² Achieving equal justice for women and men in the courts, the draft report of the Judicial Council Advisory Committee on gender bias in the courts, Judicial Council of California, 1990, Ch. 4, p. 3.

¹³ Indian Equal Remuneration Act, 11 February 1976 (as amended 16 December 1987), sections 7 and 12.
2. Proving the case

(a) Burden of proof

In an employment relationship, it is generally true that the employer is in a much stronger position than the employee. The employer is likely to be in a better financial position and to be in control of sources of information. The implications of this power during litigation are obvious: the employer is likely to have better legal representation and more relevant information under his or her control which can be submitted as evidence. Discrimination complaints also, in many cases, involve a certain amount of investigation into an employer’s “state of mind”, or other hidden factors to which only the employer has access. Such subjective evidence is often used to determine whether the alleged discriminatory practice was, in fact, based on the complainant’s gender.

In court actions one party usually has to meet a certain standard of proof as to the truth of the allegations. This “burden of proof”, as it is called, in civil cases is “more likely than not”. Approaches vary somewhat between legal systems and countries, but in general the procedures followed in discrimination cases are the same as those followed in other civil cases. One general approach allows the court or tribunal at the end of the complainant’s case to consider whether the evidence is sufficient to show a prima facie case of discrimination. If it does, then the defendant needs to present evidence to the contrary. The burden of proving the case rests with the complainant, although this type of procedure often is described as the “shifting” of the burden of proof.

This approach is intended to help redress imbalance between the employer and employee in discrimination cases. The burden of proving the allegations is sometimes shifted to the employer, or shared between the two parties (although this is probably the case in a minority of countries). There is a European Community proposed directive concerning the burden of proof (embodying the idea that it should at least shift from the employee to the employer after a presumption of discrimination has been raised) which has not been formally adopted but which represents the current practice in most European countries.

In Italy, when the petitioner furnishes evidence (including that which may be inferred from statistical data regarding hiring practices, remuneration, the assignment of tasks, transfers, promotions and dismissals) which specifically and consistently justifies a presumption of sexual discrimination in actions or behaviour, the burden of proof falls on the respondent to rebut or disprove this presumption. (In other words, the burden shifts from one party to the other after evidence has allowed a presumption of discrimination.)

Although shifting the burden of proof works to the advantage of the complainant in discrimination cases, there are many advocates for placing the entire burden on the employer as is often done in other types of labour disputes. This would be consistent with the principle of favor laboratoris which means that in labour disputes legal rules are to interpreted in favour of the employee, especially where there is any doubt. It would also follow many countries’ rules on employment dismissal. The Cyprus Law on Dismissal states that, in every procedure before the tribunal, it will be presumed, in the absence of proof to the contrary, that the employer has not terminated the employment of the employee for a valid reason. Therefore, there is an underlying presumption in favour of the complainant which the employer must disprove, rather than an allegation which the employee must prove. The

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14 Italian Act on Positive Measures to Promote Equality Between Men and Women at Work, 10 April 1991, section 4(5).

15 Cyprus Termination of Employment Law, 27 May 1967 (as amended by the Terms of Employment (Amendment) Law 1968).
situation is similar in many countries including Hungary, Sweden, Swaziland, and Rwanda. In the Canadian Human Rights Tribunals, it is recognized that evidence and proof can be very difficult, so the rules of evidence are more flexible. The standard of proof is less rigorous: for human rights cases, it is sufficient to show a balance of probability in favour of one party or the other. Practically speaking, this means that if the respondent is unable to produce a satisfactory answer to the complaint, discrimination can be reasonably inferred.

In Norway, the rules concerning the burden of proof are administrative rather than statutory in origin. They were decided by the Equal Rights Board when dealing with a hiring complaint (and consequently followed by the Ombudsman). The rule has since been applied to other types of cases. Like the courts, the Board decided the burden of proof should shift after the complainant has shown objectively different treatment. In actions taken by the administrative body, the burden stays with the administrative body.

In relation to equal pay cases in the United Kingdom, if a woman is receiving less pay than a man in the same enterprise for doing equal work (same or broadly the same, or different work of equal value), the law presumes that the inequality in pay is due to direct or indirect discrimination. The employer has available to him or her what is known as the material factor defence, which enables him or her to rebut the presumption by showing that the pay inequality is due to some other significant factor. A House of Lord’s decision has broadened the scope of this defence to include economic justifications to all equal pay claims. The point is now sub judice in the case of Clarke and Others v. Bexley Health Authority (speech therapists case). The matter is now on appeal to the Court of Appeal, which is in turn considering a referral to the European Court of Justice.

Germany provides an example of how the burden of proof may be eased in equal pay claims. If a system of remuneration is lacking in transparency then the employee need only show, on the basis of a relatively large number of employees, that the average remuneration of female employees is lower than that of male employees. The employer must then show that the system is not discriminatory.

(b) Statistics

Proof in individual cases (or in group actions) can include direct evidence of a discriminatory motive for the adverse action. Such proof, however, is often non-existent or difficult to obtain. More often claimants prove their cases though indirect evidence from which an inference of discriminatory motive or impact can be drawn. This evidence is used to show that the treatment of the complainant differs from that accorded to otherwise “similarly situated” individuals who are not within the group of persons protected by the law against discrimination. In other words women must show they were treated differently than similarly situated men. The employer uses this same method in reverse to show that a woman was not treated differently than men, and thus was not discriminated against.

Indirect discrimination cases are not based on proof of discriminatory intent. These cases are based on proof that an employer’s action has an adverse impact on the protected group as compared to individuals outside the protected group. This means women need to show that an employment practice has an adverse impact on them and not on men. The focus

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17 Swaziland Employment Act, 26 September 1980 (as amended 1981 and 1985), section 42.
18 Rwandan Labour Code, 28 February 1967, article 38.
19 Halvorsen, op. cit.
20 United Kingdom Equal Pay Act, LS 1970 — UK 1 (as amended by the Equal Pay (Amendment) Regulations, 6 December 1983), section 1(3).
is thus on the results or consequences of the practice and not on the intent. Statistics play a vital role in establishing or disproving indirect discrimination. Procedural rules which restrict the introduction of statistics into evidence greatly hamper a claimant's ability to prove her case.

When permitted, statistics may still be problematic for a claimant. Their introduction often requires proof as to their relevance, accuracy, and completeness. Their compilation can be time-consuming and the ability to marshal the statistics to prove a case requires expertise. Thus the use of statistics is both necessary and problematic to the proof of many gender-based discrimination claims.

3. Protection against reprisals

Persons who feel they have been discriminated against may often refrain from lodging a complaint for fear of retaliatory action by their employer: in the worst case scenario, a woman may fear she will be dismissed if she complains. This is obviously unacceptable: to suffer retaliation in return for exercising a right granted by law. Concern also has been expressed about the ability of employers in some countries to terminate employment without having to give reasons.

A survey reported in *The Washington Post* showed that the majority of congressional staffers admit they would be worried about the possible retaliation from their employer were they to make a discrimination complaint. Therefore they would be unlikely to do so for fear of jeopardizing future job prospects. It appears that fears of this sort, if not dealt with, could undermine the best enforcement machinery: if individuals are too afraid to use the machinery then its existence serves little purpose. The concern over retaliation is not limited to prospective complainants. It extends to those employees who may have information vital to the victim's case and who may be necessary witnesses for establishing proof of discrimination.

Many countries do have provisions covering victimization for having complained. For example, the Cyprus Equal Remuneration Law, states that a person cannot be dismissed for submitting a complaint, and provides a maximum fine of £1,000 for non-compliance. Case-law had already applied this principle: for example, *Tryfon Neophytou v. Stamatis Mavropoulos* (Case No. 15/1969) reiterates that making claims or complaints is not a valid reason for dismissal. This sort of victimization is also an offence, subject to a fine, in Australia. In New Zealand, it is an offence if the employer alters any employee's job position or dismisses that employee within 12 months of the employee making or causing a complaint to be made.

Ethiopia uses a different approach by stipulating in the Labour Code that no labour inspector shall reveal to any person (other than the concerned authority in the Ministry) the sources of any complaint brought to his attention concerning a deficiency or breach of a legal provision. In particular, he shall not make any intimations to any employer or his representative that his inspection visit was made in response to a complaint filed with the labour inspection service. The situation is similar in Japan, where the Labour Standards

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23 The Australian Sex Discrimination Act, 21 March 1984, section 94, provides for the imposition of fines on persons who subject or threaten to subject another person to any detriment for making or proposing to make a complaint under the Act.


Law provides that a person can tell an inspector about a violation and cannot be discriminated against for doing so.

In Ghana, employers are prohibited from discharging or otherwise discriminating against a person who has made a complaint or given evidence or assisted in any way the initiation or presentation of a complaint or other proceedings to secure equal pay. The Labour Codes of Guatemala and Honduras also contain such provisions, prohibiting reprisals against employees for exercising their labour, constitutional, or other social welfare rights. In the Philippines such victimization is treated as an unfair labour practice.

All European Community Member States have legislative protection against reprisals. A retaliatory dismissal is null and void in France, Germany, Italy, and the Netherlands, and can be declared void by a Greek tribunal. In Belgium, Denmark, Ireland, Luxembourg, Portugal and the United Kingdom, compensation and possible reinstatement are available, and fines may be imposed as well.

There does not appear to be a common practice concerning the remedies and/or sanctions used to address this problem. The United States has a wide range of options for dealing with this issue. Nevertheless, victimization seems to be a pressing problem (as shown, for example, by the Congressional survey) even where protective measures are in place. Women are probably deterred from complaining in the first place, especially if it involves court action, but the possibility of having to initiate further proceedings against the retaliation must be even more intimidating. If an individual feels that she will be dismissed if she makes a claim of discrimination, and that her only remedy is court action, her decision to keep quiet would not be surprising. This is particularly true during a period of high unemployment: many people would probably rather tolerate discrimination than risk dismissal, when there are so many others waiting to fill an empty post.

The protection against reprisal dismissal may not be enough. Victimization for having complained may not always take the form of a dismissal, but instead might be more insidious in nature, e.g. gradual erosion of responsibility or benefits. These subtle reprisals seem much more difficult to address. The problems of proof connected with any discrimination dispute hold true here. A very effective way to address this problem is to allow class or representative actions, because a whole group is less likely to suffer reprisals than a single individual.

4. Adequate representation and financial resources

One of the most serious problems associated with individual enforcement through judicial action is the financial cost. Once a case reaches the litigation stage, a claimant is usually required (or needs to) retain legal counsel to represent her. After that point, many other costs accrue such as lawyers' fees, filing costs and investigation costs. As mentioned above, the employer will often be in a stronger financial position than the employee to pursue the litigation. The complaint's prospect of compensation (if ordered) may in fact only cover the costs of the legal proceedings. Thus the potential costs of litigation may act as a serious deterrent to complainants, particularly to someone who has just lost her job.

One solution to this problem is to make legal aid available for discrimination proceedings (it is often available for criminal and other proceedings). A plaintiff can apply...
for financial assistance in civil matters in Malawi. In the Philippines, the Constitution states that free access to the courts and quasi-judicial bodies as well as adequate legal assistance, shall not be denied to any person by reason of poverty. Spanish women are also entitled to legal assistance under the Constitution.  

Another approach to this problem is simply to make the proceedings free, as has been done in Burkina Faso. In Swaziland the Industrial Court has no costs, but the High Court does. Tribunal procedures are also free in the Central African Republic, Chad and Mexico.

In the United States, employment discrimination cases are usually handled by lawyers on a contingency fee arrangement as the federal law provides for all costs and fees to be paid by the defendant employer if he is found to have committed discrimination and judgement is rendered against him.

In addition to the costs involved, adequate legal representation requires finding a lawyer who has expertise in employment discrimination or equal pay claims. In many countries this is a difficult task. One general obstacle that is often mentioned in relation to court cases is the length of time required to pursue a case to its conclusion. In many countries this can take years which renders the process ineffective.

5. Specialized experts and other procedures

The issues involved in employment discrimination cases are often very complex and may be highly sensitive. They require specialized knowledge and special procedures (in addition to group action) to be dealt with effectively. Recognition of these needs has led some jurisdictions to use specialized experts in discrimination cases. The experience of using experts appears to be mixed. On the positive side, the expert brings to the case information and knowledge which a judge or tribunal panel member usually does not possess. It eliminates the need for the claimant to find and engage an expert whose fees could place a financial burden on the complainant which could prohibit pursuit of the case. Use of specialized experts, however, may also considerably slow the pace of the proceedings because they require time to prepare their expert reports. There is also concern over their use resulting in the transfer of quasi-judicial authority to the expert, a situation most judges would prefer to avoid.

British tribunals use independent experts. Their reports are evidence, but not given any special status. The tribunal must decide what weight to give such evidence. Expert reports however must be used for questions of equal value in equal pay cases before the tribunal can make a determination. These independent experts are appointed by the ACAS. Although the reports are considered helpful, the experts are criticized for causing delays. In 1990, the average time period between the tribunal's issuance of a request for an expert report and the expert's actual submission of the report to the tribunal was eight months.

Due to the nature of discrimination cases, ordinary rules of civil procedure may be too rigid and inadequate for their proper handling and resolution. Therefore, in some countries special procedures may be followed in discrimination hearings to ease the handling of sensitive subject-matter (particularly in instances of sexual harassment), or to facilitate more pleasant, friendly surroundings for the parties. The evidence required in a discrimination case may be slightly unconventional or difficult to gather. It is often related to a "state of mind" in the sense of finding the true reasons why an action or decision was taken by an employer, as well as determining its emotional and psychological impact on the victim(s). Thus, flexibility may be needed to obtain all relevant facts in a case.

31 Spanish Constitution, 1978, article 24(2).
32 Tribunal proceedings are free under the Labour Code, article 188.
It is perhaps helpful if the rules of evidence are relaxed as is the practice described above in the Canadian Human Rights Tribunals. The Philippines Labor Code provides that the ordinary technical rules are not binding: the spirit and intention of the Code is that the parties shall use all and every reasonable means to ascertain the facts speedily and objectively in the interest of due process.\(^{33}\)

Another special procedure used quite frequently is the closed or in camera hearing. This is possible in Hungary, for example, where a closed-court hearing can be imposed if considered to be necessary from a moral point of view.\(^{34}\) It is also possible in Slovenia, where the public may be barred from the court because of official, business or personal secrecy, public order or for the reason of public decency.\(^{35}\)

A slightly different approach is favoured in the United Kingdom where regulations can now be made to prevent the identification of anyone affected by or making an allegation.\(^{36}\) Reporting of the case can also be restricted until the end of the case. Breach of these regulations can result in criminal sanctions, and similar regulations can be applied to the Employment Appeals Tribunal. In Spain, there is the possibility of using an expedited procedure in fundamental rights cases.\(^{37}\)

C. Representative and group action

Class and representative actions can be effective ways of combating discrimination within the enforcement process. A class action is a procedural mechanism which allows an individual complainant to file an action of discrimination on behalf of other similarly situated persons. The findings of the court, including remedies, are extended to all persons in the identified class. The representative action is similar. It is a procedure that allows an organization to file an action on behalf of its members or on behalf of persons whose interest the organization represents. Thus, a successful class or representative action may result in positive changes for an entire group of discrimination victims.

From a group justice point of view, these actions are more effective than individual actions for several reasons. First and foremost, the class action may be the only type of action that can redress indirect discrimination. Indirect discrimination is generally defined as an apparently neutral practice or working condition which in fact has a discriminatory effect on more members of one group (in this case, women) than on the other group. It is defined by reference to a group which makes class action one of the obvious means of combating such discrimination, or at least remedying it. The potential to correct the institutional structure or practice that created the discrimination exists in these cases. Class actions are also more likely to deter the continuation of a discriminatory practice than are individual actions. In the United States, sex and race discrimination class actions should receive much of the credit for the equal opportunity achievements made by the judicial process.

Only a few countries allow class or group actions. In the United States a class action can be brought in order to obtain a decision affecting all the workers in the discriminated category under Civil Rights Act 1964, Title VII, as amended. These actions may be brought, however, only after certain conditions are met, e.g. the requisite class size, the common

\(^{33}\) Labor Code of the Republic of the Philippines, 1974, article 221 as amended by section 11 of the Republic Act 6715.

\(^{34}\) Civil Procedure Code, section 1(7), as cited in the Hungarian country report for the Brussels meeting.

\(^{35}\) Civil Procedure Act, article 307, as reported in the Slovenian country report for the Brussels meeting.

\(^{36}\) Trade Union Reform and Employment Rights Act, 1 July 1993, as cited in the United Kingdom country report for the Brussels meeting.

\(^{37}\) Spanish country report in A. Bronstein and C. Thomas.
nature of class members’ rights and interests as well as the fairness and adequacy of their representation.

Somewhat similar to the American class action is the provision in the Canadian Human Rights Act, which allows complaints to be filed by more than one individual or group alleging discriminatory practice. If the Commission is satisfied that they deal with substantially the same issues of fact and law, it may deal with those complaints together. Although this approach does not extend to unknown complainants (as the American model), it would appear to serve the same purpose in terms of effectiveness. It also appears to be a very sensible administrative approach in view of the heavy case-load of the Commission. Similar provisions are also found in Australia and New Zealand.

Use of class action procedures should not be identified only with the industrialized countries which have common law legal systems. In Afghanistan, the Constitution lays down certain fundamental rights, and gives a right of complaint through individual and group petition to related government organs. In India, a recognized welfare institution may bring a complaint to court (this includes three women’s groups, but it does not appear to include trade unions). It is also established by case-law that class action is possible in equal remuneration cases. The designation of these non-governmental groups to be representative petitioners to the court is an interesting enforcement technique which warrants further study. It may well serve as a good example to be followed in other countries.

In many countries trade unions or other employees’ organizations may bring an action of discrimination on behalf of their members. In some cases the union must obtain the consent of the member and be duly authorized to represent her. In other cases the union may take legal action without prior authorization from the person concerned. For example, in France, a trade union may exercise all the rights of a civil plaintiff in any court of law in respect of matters directly or indirectly affecting the collective interest of the occupation that it represents. In Tunisia, trade unions are able to defend the interests of their employees. Unions can also bring an action in Hungary. In Madagascar, to apply the principle of equal remuneration for work of equal value, the worker or his union may take the dispute to the inspectorate or the Labour Tribunal.

The extent to which unions bring representative actions on behalf of women in discrimination cases, could be a subject of further study. Such an analysis could address the enforcement of both equality provisions in legislation and in the collective bargaining agreements themselves. One positive example often noted is the representative action taken by the Women’s Departments of certain unions in Cyprus. These unions complained against the Cyprus Telecom authority for advertising jobs for men only.

In some countries the special enforcement bodies referred to in section I of this paper are entitled to initiate their own legal action against violations of equality legislation. Their entitlement to bring a case may be conditioned on the failure to resolve it through conciliation. For example, in Iceland, the Equal Status Council is empowered to initiate legal proceedings if its proposals for redress concerning a violation of the equality provisions is not met. In Sweden, the Ombudsman may initiate proceedings with the labour court on behalf

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31 Canadian Human Rights Act, 12 December 1988, section 40.
33 ILO General Survey on Equality in Employment, 1988, supra at paras. 219-220.
of the alleged victim of discrimination if a settlement proves impossible, and the Ombudsman considers the dispute to be important for the enforcement of the law. 44

Both class and representative actions may reduce the risk of reprisals against individuals who would claim discrimination. They also offer the advantage of eliminating or reducing high financial costs and may be more efficient administratively (although this is debatable in some class actions). Group actions also offer support and reduce the vulnerability of the individual claimant. For those reasons, countries which do not now permit class actions in discrimination cases should consider instituting such a procedure. The use of representative action on behalf of women in discrimination cases by workers’ organizations, special enforcement bodies or other designated groups should be encouraged over individual actions, wherever possible.

D. Remedies and sanctions

Effective enforcement of equality provisions must entail an adequate and appropriate system of remedies and sanctions. Access to justice would be of little import to a claimant or group of claimants unless, at the end of successful legal action, an appropriate, adequate and effective remedy can be obtained. What is an appropriate and effective legal remedy and sanction? From the individual claimant’s view it should be compensatory and provide relief for the harm caused. In discrimination cases, individuals may suffer both monetary and non-monetary damage. In addition to the contract and employment breach that may have occurred, a person who has been discriminated against usually suffers from mental and emotional distress. They may also have suffered past and present economic loss and anticipate future economic loss. In sexual harassment cases, they may have suffered humiliation. The complainant should be able to stop or nullify the discriminatory action.

From the group justice perspective, remedies and sanctions should be able to tackle and eliminate the cause of the discriminatory treatment or effect. If necessary, the remedy should extend beyond the individual who brought the case to others similarly affected. It should also be sufficiently punitive to act as a deterrent to the continuation of such practice. In other words it should not be cheaper for an employer to pay a minimal fine rather than to stop the discriminatory practice. Optimally, remedies should be fashioned for the specific situation at hand to remedy both the cause and effect of gender discrimination and should prevent its recurrence.

From either perspective, a remedy should not be merely symbolic. The range of sanctions and remedies in use in countries includes criminal sanctions, civil damages, exemplary damages, injunctive relief, equitable relief, costs and fees. It is probably in this area, more than any other, that efforts are being undertaken to strengthen equality laws. In a meeting of European labour court judges, 45 they agreed that it would be most effective to have available a wide range of possible penalties and sanctions to apply in discrimination cases.

1. Criminal sanctions

There is no general practice on the use of criminal sanctions in discrimination cases: some countries provide for them and some do not. 46 The fact that the Philippines has recently introduced criminal sanctions (in the form of fines and imprisonment) into its labour

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45 A. Bronstein and C. Thomas.
law 47 to help combat discrimination, and that Germany has a draft law to do the same, shows some countries have identified the need for criminal sanctions in this area. France, on the other hand, has had criminal sanctions in place since 1975. Still there is no evidence that the French have been any more successful than other countries in implementing their equality legislation. In the recent meeting of European labour law judges it was noted that while there is doubtless a need for effective enforcement to give weight to the equality provisions, there is a body of opinion which questions the use of criminal sanctions to ensure this. 48

In the absence of detailed statistics on the discrimination cases brought and the remedies granted or sanctions imposed, it is very difficult to evaluate whether criminal sanctions are more effective than civil remedies or vice versa. Perhaps it is not an "either/or" issue. The ILO Committee of Experts has stated that both criminal and civil remedies should be available to promote application of the principle of equal opportunity and treatment in employment. 49

Many countries throughout the world, i.e. Antigua and Barbuda, Spain, India, Jamaica, Mongolia and Slovenia, authorize criminal fines, and up to 12 months of imprisonment, against those who engage in discriminatory employment practices on grounds including sex. The advantages of criminal sanctions are that they carry public sanction and therefore may be the best deterrent to acts of discrimination. They may be indicia of a State's intention to fully support its national equality policy. In other words, criminal sanctions are associated with serious action.

One of the main drawbacks to criminal sanctions is that they are so seldom invoked. How many employers or chief executive officers have ever been imprisoned for discriminating against women in their hiring practices, or in any employment practices? The answer is — very few. This lack of application places the deterrent value of the statutes into question. The lack of use may also be attributed to public prosecutors' unfamiliarity, reluctance or inability to take on such cases. Also, the burden of proving discrimination is heavier in criminal actions than it is in civil actions. This makes it harder to be successful. One other major limitation to criminal actions is that no remedy flows to the victim. The fine is paid to the State.

Although important as punitive measures, criminal sanctions alone, particularly as applied today, are probably not sufficient to bring about genuine, long-term change in employment practices: this is where equitable and civil remedies come into play.

2. Civil damages

The most common form of civil damages are those paid to compensate the victim for loss occasioned as a result of the discriminatory action. In many countries, the amount of the damages that can be awarded are limited. For example, a monetary remedy for injury to feelings in the United Kingdom cannot exceed 8,925 pounds. 50 No limit is placed on compensatory damages in the United States, although it is often very difficult to prove injury other than economic loss. Many countries limit the amount of economic loss that can be claimed. An inadequacy of compensatory damages is illustrated by a German case involving discrimination in hiring; the successful claimant was only indemnified for the expenses of the application (that is, literally the price of the stamps, etc.). Typically, however, claimants

48 A. Bronstein and C. Thomas, supra.
receive awards for back pay and some jurisdictions allow payments for anticipated future economic loss resulting from the discriminatory action. Monetary damages are usually highest in termination cases and very low in hiring claims.

The only drawback to compensatory damages is that they are often low, they do not usually compensate all the loss suffered as a result of the discrimination, and they do not usually act as a deterrent. Nevertheless, from the individual justice theory, they are essential components of any remedy system. To fully compensate a victim of discrimination, both economic and injury to feelings should be covered.

Punitive damages are another form of civil damages. They are awarded by courts to punish violators of the law. Punitive damages are not available in many jurisdictions. Where they are authorized, they are only used in egregious cases of discrimination where intent has been proven. Many aspects of these damages are similar to criminal sanctions, i.e. they are to act as a deterrent to the practice of discrimination in employment. The payment of the damages, however, is made by the employer to the employee who suffered the discrimination. In the United States, where such damages are available without limit, employers have complained about the cost of high awards.

3. Equitable relief

Equitable remedies may well be more effective than their legal counterparts. They are usually discretionary, and may offer more practical solutions in cases which are not suited to purely financial remedies (for example, in cases of discrimination in access to employment). They may also have long-term effects. A court might order an employer to change a certain practice or pattern of behaviour, undertake training or institute an affirmative action programme. Use of equitable remedies allows the various means of action available to promote equality to be mutually reinforcing, i.e. legal enforcement and training. However some reports indicate that little use is made of such possibilities.

The Canadian Human Rights Tribunals can order a practice to be stopped and/or compensate the victim of discrimination. The case of Canadian National Railway Co. v. 

Canada (CHRC) 1987, which involved discriminatory hiring and promotion practices, established that the Human Rights Tribunal (pursuant to its jurisdiction under section 41(2)(a) of the Canadian Human Rights Act) may impose special employment programmes on employers to address the problem of systemic discrimination in the hiring and promotion of disadvantaged groups. In the United States the policy guidance from the Equal Employment Opportunity Commission encourages remedies which are tailored to the employer, and views these as the most effective means to eliminate the discriminatory practices.

Reinstatement is a very important remedy which allows a claimant to be returned to the job from which she was dismissed. (It is classed here as an equitable remedy, but in some cases it may in fact be an element of contract law. For example, in the United Kingdom, reinstatement is not an option in all cases of dismissal because the courts will not order the specific performance of a contract of employment. To put it another way, they will not enforce labour relations.) Where reinstatement is an option, it is almost always discretionary (that is, at the discretion of the court, and, in some cases, at the discretion of the employer). In many jurisdictions, if reinstatement is not ordered, damages must be paid to the claimant in lieu of reinstatement.

The remedy of reinstatement is available in many countries. In Swaziland, reinstatement can be recommended for cases of unfair dismissal, but it cannot be ordered. Labour inspectors in Gabon can recommend reinstatement during conciliation, and a tribunal may

This was established in the Ubombo Ranches decision, 21 Nov. 1984.
inspectors in Gabon can recommend reinstatement during conciliation, and a tribunal may do the same at the time of the hearing. Reinstatement is also an option in the Philippines and, if ordered, it is effective even if an appeal is pending. The New Zealand Employment Contracts Act provides for the reimbursement of any wages lost due to the grievance, and for reinstatement to the employee's old position or in a position no less advantageous (to that employee). Compensation may also be ordered, or recommended action by the employer in cases of sexual harassment. Hungarian law contains provisions on reinstatement, lost wages and compensation.

In Sweden, reinstatement can be ordered, and if the employer refuses to reinstate the employee after being ordered to do so, the employer has to pay substantial damages (which can be up to 48 months' wages). An employer must also continue to employ an employee until a dismissal dispute has been resolved. In Australia, the Human Rights and Equal Opportunities Commission can declare that an act is unlawful and should stop, or that the employer should perform any reasonable act, including employing, re-employing or promoting the employee (or applicant).

Another remedy which may be available is the injunction. An injunction can be used to stop a discriminatory action or conduct from continuing. In the Philippines, the Labor Commission has injunctive power against the actual or threatened commission of prohibited or unlawful acts in any labour dispute. It must be shown that these acts, if not restrained, may cause grave or irreparable damage to any party or render ineffectual any decision in favour of such party.

In Hungary, the discriminatory behaviour of the employer is voided and the employer may be compelled to continue employing the individual without the discriminatory condition of work (or whatever was under dispute). The situation is the same in Spain, where an employer's decision is void if it has discriminatory implications, and the action must stop immediately. In the United Kingdom a clause in a collective agreement might be declared void as applied to one claimant, but it remains operative in other persons' individual contracts until renegotiated or challenged in court by each person individually. In Japan, a whole collective agreement may be nullified. In a case before the Supreme Court an agreement excluded from an annual pay raise those workers who actually worked less than 80 per cent of the fixed hours, due to, inter alia, absence by maternity leave. The agreement was nullified.

Equitable remedies have the potential for being an extremely effective tool. Ideally, a wide range of remedies should be available. These include the ability to: deter employers from discriminatory behaviour with criminal sanctions or punitive damages; cause real change in practices through the imposition of equitable remedies (such as education programmes); and help complainants at their own personal level, through compensation or reinstatement.

E. Enforcing judgements

Once a judgement or opinion has been rendered by a court or tribunal, it must be followed by the employer if it is to have any effect. In cases where it is not followed, claimants need to have some means of forcing the employer to comply with the order. It is

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53 Sweden Equal Rights Act, section 39.
54 Labor Code of the Republic of the Philippines, 1974, article 218 (as amended by section 10 of Republic Act 6715).
55 Hungarian and Spanish country reports in A. Bronstein and C. Thomas.
in these instances that many countries invoke criminal sanctions for non-compliance with court orders. In some countries these are called contempt proceedings. In many countries, such as France and Norway, the sanctions for failing to follow an order are harsher than the original sanctions for the discriminatory action. In Norway, violations of the Equal Rights Act are not subject to criminal sanctions themselves. A violation of an order of either the Equal Rights Ombudsman or the Equal Rights Board, however, may incur a fine.

In Canada, for example, fines of up to $50,000 are provided in case a party fails to comply with the terms of a settlement which is reached. Another approach is taken by the Philippines, where any law enforcement agency can be deputized by the Secretary of Labor and Employment or the Labor Commission for the enforcement of decisions, orders or awards.
V. Specific difficulties in the application of equal pay

Throughout this paper, mention is made of the difficulties encountered in the enforcement of non-discrimination and equal pay provisions. The difficulties encountered in equal pay cases appear to be greater than in many other discrimination cases. The present enforcement mechanisms appear to require adjustment to become more effective in resolving equal pay claims. In any revision of the national enforcement mechanism, the following key points concerning the application of the principle of equal pay for work of equal value should be considered. The very meaning of the term “work of equal value” still gives rise to uncertainty and confusion in many jurisdictions. Simply put, the principle of equal remuneration for work of equal value is intended to redress the undervaluing, and subsequent lower pay, of jobs undertaken primarily by women, when those jobs are found to be as demanding as the different jobs undertaken by men. The principle thus contemplates the comparison of different jobs on the basis of their content. Accordingly, it is much broader than the notion “equal pay for equal work” that was prevalent in most countries of the world until the early 1970s. That definition, or any of its variations, such as equal pay for the same work or substantially similar work, tended to restrict the equal pay principle to jobs that were identical in content, even though the job titles might have been different.

1. Determining the value of jobs

If the jobs of women and men are to be compared in terms of their content or “value”, there must be some means to assess and compare the actual nature and demands of the work to be performed. Convention No. 100 only specifies that measures are to be taken “to promote the objective appraisal of jobs on the basis of the work to be performed” where “such action will assist in giving effect to the provisions of this Convention”. The ILO Committee of Experts has noted, however, that even though the Convention does not impose an unconditional obligation to take measures for the objective appraisal of jobs, some form of job evaluation is the only method set forth in the Convention for differentiating wages in conformity with the principle of equality. Job evaluation schemes are not, however, free from problems in implementing pay equity. Job evaluation or classification is a mechanism used to determine the hierarchy of jobs in an organization or in a group of undertakings as a basis for devising a rational pay system. Such systems were, and remain, management tools to rank the order of jobs. Accordingly, they often reflect conservative or traditional organizational structures, including a gendered division of labour. Moreover, these systems may be influenced by differing societal perceptions about the importance of factors such as education or training. Many systems for comparing jobs are unable to take account of the diverse content of the different jobs in an organization, for example, administrative workers and nurses, because they were designed to order different hierarchies of posts for each particular group of jobs, based on different evaluation criteria. Emphasis was placed on using the same criteria for both men and women in job evaluation and classification systems only in the 1980s. Precise definitions of the elements to be compared were then included in national legislation. Generally, these are based on training and experience, responsibility, physical and mental effort and the conditions in which the work is performed.

These apparently objective criteria have also proven inadequate safeguards against sex bias. In particular, they tend to upgrade certain criteria specific to male jobs at the expense

1 The principle of equal remuneration for work of equal value is enunciated in the ILO Convention on Equal Remuneration, 1951 (No. 100).
of ignoring or minimizing factors considered more "feminine", for instance, physical strength rather than the strain of repetitive work at a sustained speed, physical effort as opposed to the emotional demand of caring for very ill persons, responsibility for product control against direct responsibility for the safety, training and well-being of children. It has been suggested that many characteristics of women's work are invisible to both men and women. Certain skills are considered to be a natural attribute of being female: for example, they are skills acquired outside the formal education system, often from other women; they are efforts appreciated more when they are left undone; they are often multiple tasks performed simultaneously in cooperation with others, very often self-initiated, rather than distinct jobs undertaken in response to formal authority. Research over the past decade has resulted in the design and construction of job evaluation schemes that include a wide range of factors reflecting men's and women's work. One such scheme, developed in New Zealand, highlights two main areas of obvious gender bias: (1) the extent to which traditional schemes ignore or undervalue jobs involving the care of other people or the requirement to organize or coordinate activities or people; and (2) the clear line management bias found in many traditional schemes that undervalues or ignores the support and non-management work performed by women.²

2. Scope of comparison

Even where legislation calls for equal pay for work of equal value, observance of that principle is commonly restricted to work undertaken for the same employer or sometimes to employment in the same establishment. As occupational segregation remains a persistent characteristic of all labour markets, progress towards equal pay will be restricted unless comparisons extend outside the scope of the individual enterprise or organization. Studies appear to indicate that the more centralized the wage-fixing system — which therefore allows potential for the broadest possible field of comparison — the greater is the ease of implementing gender pay equity. Conversely, as countries have moved towards decentralization, with employers being allowed greater autonomy to fix wages, there is concern that the existing means of enforcement will prove inadequate. There are enough indications to suggest that women's inferior position in the workplace, their weaker bargaining power (either as individuals or as a group) and their lack of power to influence the bargaining agenda, may be further disadvantaged by the move towards individual or enterprise bargaining. Apart from the need for employers and trade unions to develop strategies that involve and protect women, there appears to be a need for the responsible government authorities to ensure that a minimum standard of equity is observed.

3. What constitutes pay

All elements of the pay package need to be taken into account in the effort to enforce equal pay for work of equal value. Today, it is often those components of pay additional to the basic or minimum wage which are operated in a discriminatory manner (though the absence of legal minimum wages in selected sectors in some countries has operated to women's disadvantage). Apparently objective systems such as productivity bonuses may be applied selectively or subjectively. Indeed, performance or merit bonuses tend to be awarded to managers, who tend to be males. The assumption of family responsibilities by women, or rather men's disinclination to assume them to the same degree, has also had a considerably negative effect on women's pay, either directly, in terms of women's ability to remain in

² Equity at work, an approach to gender neutral job evaluation, New Zealand Department of Labour and the State Services Commission, 1991.
employment continuously or, indirectly, through traditional views about the commitment of married women or mothers to work. Seniority pay has discriminated against women whose careers are disrupted to meet family responsibilities, particularly in countries like Japan where lifelong attachment to a particular company has been the norm. It has been noted by various researchers though, that when advancement depends more on seniority than other factors, women may better achieve higher grades than when managerial discretion plays a major role in determining progress.

From the point of view of enforcement, it would be important, therefore, to ensure that the responsible authority consider all of the various components of the wage differential, and devise responses that may address the forms of discrimination responsible for the inequitable payments.

4. Improving enforcement

Frustration with slow progress towards implementing pay equity has led some authorities to take more dynamic measures. In the Canadian Province of Ontario, for example, the wages of women employed full year, full time, remained at just 65 per cent of men’s wages throughout most of the 1980s. Legislation allowing individual women to complain against discrimination by individual employers had little impact on women. Collective bargaining was not solving the problem, in part because so few women were unionized, in part because employers resisted union demands for equal pay and in part because some unions did not place equal pay at the top of the agenda. Against this background, the Pay Equity Act 1987 was introduced to “redress systemic gender discrimination in compensation for work performed by employees in female job classes”. The legislation is proactive, rather than complaint-based. It includes a specific commitment to affirmative action designed to eliminate indirect discrimination, regardless of intent against jobs traditionally performed by women. Employers in the public and private sectors are required to prepare and post pay equity plans using a gender-neutral comparison system within a specified time frame. The Act also sets a minimum on the total annual amount to be allocated by employers for pay equity purposes until pay equity is achieved. (Pay equity is achieved when the job rates for the female job classes are at least equal to those of male job classes of equal value.) Concern that women in all-female establishments lacked comparators (and many in other establishments lacked suitable comparators) led to 1993 amendments to the Pay Equity Act. These establish two new methods of achieving pay equity: proportional value comparisons and proxy comparisons. Both new methods, like the job-to-job comparison method already in use, require a gender-neutral comparison of skill, effort, responsibility and working conditions between male and female job classes. Proportional value comparisons are to be used by both public and private employers in situations where there is an insufficient number of equal or comparably valued male job classes to make direct comparisons. In such cases, employers must determine the relationship between the value of the work performed and the pay received by male job classes and apply the same principles and practices to paying female job classes. Proxy comparisons — to be used only in the public sector where there are insufficient male classes to use the other methods — involve looking outside the establishment for comparators that would serve as proxies to determine pay equity adjustments. While it is perhaps still too early to assess the full impact of the Ontario legislation, it has undoubtedly improved the pay of many women.

Dr. P. Armstrong: “Equal pay for work of equal value” (The Ontario experience. Paper prepared for the seminar “Equal pay, 36 years later: In search of excellence?”, sponsored by the Belgium Minister of Employment, Labour and Equal Opportunities Policy and the Equal Opportunities Unit of the European Commission, Brussels, October 1993.)
by raising the value of their work. Perhaps the most significant lesson to be drawn from cases like the Ontario experience is that the achievement of pay equity depends, to a significant extent, on the social and political will of the responsible authorities. A determination to establish and maintain pay equity will necessarily involve a regular evaluation of the enforcement methods and their impact; and, if necessary, action to streamline or change those methods.
VI. Conclusion

The overall impact of administrative and judicial action is difficult to measure. Chambers and Horton conducted a study on the impact of industrial tribunal decisions in discrimination and equal pay cases on employers in the United Kingdom. They focused their study on whether losing a case at a tribunal had been an incentive for the employers to take remedial action to deal with the source of discrimination, or to examine current employment practices, or to promote equality of opportunity within the organization. The study concluded that for the majority of employers, the tribunal had no effect on attitudes towards promoting equality. There was some evidence that an adverse decision, or at least the filing of a complaint, played a part, among other influences, towards the adoption of an organizational equal opportunity policy. There was little evidence, however, that the industrial tribunal decisions led to a review of existing equal opportunity policies. In some cases the adverse decision resulted in disciplinary action against the offending employee. Of the few recommendations made by panel members to the employers, only several were implemented.

The Chambers and Horton study also concluded that large employers were more likely than smaller employers to take action following an adverse tribunal decision. Public sector bodies had a higher rate of follow-up action to promote equality after tribunal decisions than did private sector organizations. The tribunal decisions were most likely to have an effect in promotion cases. They were least likely to have a positive effect in equal pay cases. Overall the study concluded that the industrial tribunal can and does play an important part in an overall strategy for bringing about employment equality. The study findings imply that the industrial tribunal could play a more important role if it could improve some of its practices and procedures. It could have a greater impact on combating discrimination. A Norwegian report states that the most successful cases are the ones where the Ombudsman, the union and the local press cooperate. ²

Most mechanisms of enforcement are not meeting their potential to help redress direct and indirect discrimination in employment. Some are simply not used. An article in the Philippines Daily Enquirer, 13 May 1989, reported that the rules have been there all along but they have been totally ignored by law enforcement personnel and employers. Others are inadequate and in need of overhauling. The limitations to the achievement of effective enforcement of equality provisions, which were identified by McCrudden in the European context (and included in the Introduction of this paper) are applicable to most national contexts. Other factors which should be added to that list include: the need to revise the definitions of discrimination to encompass indirect discrimination and to establish clear obligations; the expansion of legal literacy programmes; the need to ensure accessibility of courts or tribunals to women in rural areas; the simplification of judicial procedures and language; the acknowledgement and accommodation, to the extent possible, of the role of customary law and tradition; the encouragement of paralegal programmes; and the encouragement of women to be trained in law.

This is not to say that isolated improvements and measures to strengthen enforcement mechanisms have not been undertaken in particular countries. Spain and Belgium offer good examples of how efforts can be made to improve the equality aspect of labour inspection. The case in Cyprus demonstrates that unions can be effective when they undertake


representative actions in discrimination cases. The designation of non-governmental groups as representatives of group action in India to bring cases to the constitutional court has great potential to make institutional changes in favour of women. Placing the burden of proof on the employer to show that he did not engage in discriminatory employment practices should help claimants show when discrimination exists. The use of equitable remedies, as in the United States, helps tailor the relief to the specific discriminatory practice.

A similar pattern of deficiencies and problems in national enforcement mechanisms is beginning to emerge in various regions of the world. Interestingly, a parallel but ad hoc pattern of remedial actions is also beginning to emerge. Nevertheless, a comprehensive set of recommendations has not been established to assist countries in their pursuit of effective enforcement of legal provisions which prohibit discrimination and promote equal opportunity in employment. Existing ILO standards concerning equality provide limited guidance in this area. They, none the less, emphasize the need for practical application of the principle of equal opportunity and treatment in employment as well as the principle of equal pay. The ILO Convention on Termination of Employment, No. 158, offers some guidance on the essential elements of an effective national enforcement mechanism. It would appear that the time is ripe for serious consideration and further study to be given to developing guidance material, at the international level, on the effective enforcement of non-discrimination and equal opportunity and treatment provisions. The guidance could be aimed at both administrative and judicial national enforcement mechanisms, and include the role which could be played by each of the social partners.
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