

GENDER DISCRIMINATION IN EMPLOYMENT: BRICS COUNTRIES OVERVIEW

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This article investigates the phenomenon of gender equality in employment in the BRICS countries where it is one of the factors hampering the economic development and basic

human rights. The authors examine the international obligations of these states under the human rights treaties of the United Nations Organization (UNO) and the International Labour Organization (ILO), compare the national anti-discriminatory norms with the international standards (ILO Conventions and the Convention on the Elimination of all Forms of Discrimination Against Women) and evaluate the observations of the relevant international bodies recently adopted in respect of the BRICS states. In particular, the activities of the Committee on the Elimination of Discrimination Against Women and the ILO Committee of Experts on the Application of Conventions and Recommendations are reviewed. In the paragraphs that follow, the national legislation and case-laws are examined. Furthermore, the reasons for the persistent gender stereotypes in the labor market, as well as the general attitude toward women's roles in society in each country are reviewed. The authors identify the obstacles to achieving true gender equality in the workplace and formulate recommendations for improving protections against discrimination of women in employment as well as ensuring equal access to employment and promotion.

Keywords: gender discrimination; CEDAW; BRICS; employment; wage gap; ILO; gender stereotypes.

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Introduction

The lack of gender equality in employment is a problem shared by all of the BRICS countries, as indicated by the fact that all five states have consistently ranked

low on the Gender Inequality Index.¹ Gender discrimination in employment has a significant impact on the economic efficiency and productivity of the states. It has been proven, for example, that an increase in the gender wage gap leads to a decrease in income per capita in the steady state and that measures aimed at supporting women's participation in the labor market have a strong positive impact on economic growth.² The authors are of the opinion that measures aimed at ensuring gender equality in the workplace are part of the path to achieving equitable, inclusive and sustainable development to eradicate poverty, which has been declared as one of the key objectives of the union.³ However, none of the BRICS Declarations contain a clear commitment to tackle the issue of gender discrimination in employment.⁴

The importance of ensuring gender equality in employment for the development of the BRICS countries is well recognised by both non-governmental organisations (NGOs)⁵ and scholars.⁶ In addition, the ILO noted that gender gaps in labor market participation remain significant in the BRICS countries.⁷ A number of research studies have focused their attention on analysing the different aspects of this problem. It has been noted that gender segregation in employment is characteristic of BRICS and in the majority of these countries, only around 40% of women are employed in the

¹ According to data published in 2020, Russia is the most successful of all BRICS countries in the struggle against gender discrimination and is ranked 52nd, then comes Brazil (84th), China (85th), South Africa (114th) and India (131st) out of 189 evaluated countries. Gender Inequality Index (GII), Human Development Reports (2020) (Mar. 30, 2022), available at <https://hdr.undp.org/en/content/gender-inequality-index-gii>.

² Tiago Cavalcanti & José Tavares, *The Output Cost of Gender Discrimination: A Model-Based Macroeconomics Estimate*, 126(590) Econ. J. 109 (2016); Åsa Löfström, *Gender Equality, Economic Growth and Employment*, Swedish Ministry of Integration and Gender Equality (2009) (Mar. 30, 2022), available at http://data.epw.org.s3.amazonaws.com/DOCUMENTS/WEBSITE2016/EUstudie_sidvis.pdf.

³ 10th BRICS Summit Johannesburg Declaration, 26 July 2018 (Mar. 30, 2022), available at https://www.mea.gov.in/bilateral-documents.htm?dtl/30190/10th_BRICS_Summit_Johannesburg_Declaration. See also Declaration of the 11th BRICS Summit, 14 November 2019 (Mar. 30, 2022), available at <http://en.kremlin.ru/supplement/5458>.

⁴ In the most recent New Delhi Declaration the words "inclusive labor markets" and "the principles of equality" are mentioned. See XIII BRICS Summit: New Delhi Declaration, 9 September 2021 (Mar. 30, 2022), available at <http://www.brics.utoronto.ca/docs/210909-New-Delhi-Declaration.html>.

⁵ Instituto EQUIT, *Women in the BRICS: Inequalities, Contradictions and Challenges* (Mar. 30, 2022), available at https://www.bricsfeministwatch.org/pdf/Women_In_The_BRICS_web.pdf.

⁶ Marina Chudinovskikh & Natalia Tonkikh, *Telework in BRICS: Legal, Gender and Cultural Aspects*, 7(4) BRICS L.J. 45 (2020); Cobus van Staden & Luanda Mpungose, *BRICS Should Adopt Inclusive Approach to Women*, Africa Portal, 28 September 2018 (Mar. 30, 2022), available at <https://www.africaportal.org/publications/brics-should-adopt-inclusive-approach-women/>; Christian Guillemet Fernández & David Fernández Puyana, *The BRICS Commitment in the Promotion of Equality Between Women and Men: Analysis from the Human Rights and Peace Perspective*, 1(1) BRICS L.J. 5 (2014).

⁷ ILO, *Decent Work and Economic Growth: Women's Participation – Equal Pay for Work of Equal Value*, paper prepared for the BRICS Labour and Employment Ministerial Meeting (LEMM), 2–3 August 2018, Zimbali Holiday Resort, Durban, South Africa (Mar. 30, 2022), available at https://www.ilo.org/wcms-sp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_636205.pdf.

non-agricultural sector.⁸ According to the sociological research findings, women are still challenged with the choice between family and employment.⁹ Another research demonstrated that Russia, China, India and Brazil all suffer from serious problems regarding the effectiveness of their gender equality efforts, and each country faces specific challenges in this sphere.¹⁰ Scholars have substantiated the need to improve the process of globalization in order to empower women to be involved in economic activities.¹¹ At one of the recent BRICS events, the participants discussed the policies adopted in the BRICS countries to enhance women's participation in the labor force¹² and presented the toolkit "Women's Economic Empowerment in BRICS: Policies, Achievements, Challenges and Solutions."¹³

The documents cited above considered the problem of gender inequality in BRICS from different points of view. However, none of them analyzed the legal framework for ensuring protection against discrimination and the relevant national jurisprudence. Neither the origins of gender stereotypes in the workplace nor the effects of those stereotypes were taken into consideration. The purpose of this paper is to fill this gap in the following manner: Firstly, the international obligations of the BRICS states in the field of protection from gender discrimination will be considered. Secondly, in the sections that follow, gender stereotypes in the labor market, legal frameworks and relevant national case-laws of each of the BRICS states will be reviewed.

1. International Obligations of the BRICS States

All of the BRICS countries have ratified the following main international instruments aimed at ensuring gender equality: the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Equal Remuneration Convention

⁸ Pinky Lalthapersad-Pillay, *Gender Influences in the Labour Market: The Case of BRICS*, 5(10) Mediterranean J. Soc. Sci. 155 (2014).

⁹ Ksenia Kizilova & Elizaveta Mosakova, *The Birth Rate in BRICS Countries Under the Gender Inequality in the Labor Market*, 19(4) RUDN J. Soc. 630 (2019).

¹⁰ Diva J.S.S. Coelho et al., *The Situation of Women in BRIC Countries: A Comparative Analysis of the (in) Effectiveness of Public Policies for the Protection of Women and Reduction of Gender Inequality in the Four Largest Emerging Economies in the World*, 5(1) UNIO – EU L.J. 121 (2019).

¹¹ Tolulope Osinubi & Simplice Asongu, *Globalization and Female Economic Participation in MINT and BRICS Countries*, 48(6) J. Econ. Stud. 1177 (2020).

¹² BRICS Dialogue on the Future of Work: Towards a Women-Led Growth Framework, Russian National Committee on BRICS Research, 17 June 2021 (Mar. 30, 2022), available at <https://nkibrics.ru/posts/show/60cb45a46272697eb4990000>.

¹³ Russian National Committee on BRICS Research, Toolkit "Women Economic Empowerment in BRICS: Policies, Achievements, Challenges and Solutions" (2020) (Mar. 30, 2022), available at https://www.nkibrics.ru/ckeditor_assets/attachments/600a8a8e6272697eb4070000/toolkit_women_in_brics.pdf.

(No. 100, ILO) and the Elimination of Discrimination in Respect of Employment and Occupation (No. 111, ILO).¹⁴

The definition of discrimination is fixed in Article 1 of the ILO Convention No. 111, adopted in 1958. It was the second international instrument to tackle the problem of discrimination in employment after the prohibition of discrimination in the Universal Declaration of Human Rights (Art. 7 (general prohibition of discrimination) and Art. 23 (equal pay)). Under Article 1 of the ILO Convention No. 111, *discrimination* includes any distinction, exclusion or preference made on the basis of race, color, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. Discrimination against women was defined in the CEDAW in 1975 as any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on the basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. As a result of the interpretation of these instruments, sexual harassment has been recognized as a form of gender discrimination by both the ILO and the Committee established under CEDAW.¹⁵

The compliance of the BRICS states with the international obligations to ensure the prohibition of gender discrimination in employment is mainly monitored by the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) as far as the two ILO Conventions are concerned, and by the Committee on the Elimination of Discrimination against Women, established under CEDAW.¹⁶ The monitoring takes the form of the consideration of the states' reports and the formulation of the recommendations unless the state has ratified the Optional Protocol to CEDAW. In this case, filing individual complaints on violations of CEDAW

¹⁴ The list of ratifications of the ILO Conventions is available here: <https://www.ilo.org/dyn/normlex/en/f?p=1000:11001::NO::>

¹⁵ See CEDAW, General Recommendation No. 19: Violence against Women, A/47/38 (1992) (Mar. 30, 2022), available at https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_3731_E.pdf; Direct Request (CEACR) – adopted 2017, published 107th ILC session (2018), Discrimination (Employment and Occupation) Convention, 1958 (No. 111) – Italy (Mar. 30, 2022), available at https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0:NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:3337422,102709,Italy,2017; Direct Request (CEACR) – adopted 2006, published 96th ILC session (2007), Discrimination (Employment and Occupation) Convention, 1958 (No. 111) – Malawi (Mar. 30, 2022), available at https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0:NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:2267240,103101,Malawi,2006.

¹⁶ However, cases on this issue might be found in the jurisprudence of the Human Rights Committee (HRC) and the Committee on Economic, Social and Cultural Rights. See, e.g., the most recent case considered by the HRC, *Elena Genero v. Italy*, CCPR/C/128/D/2979/2017, No. 2979/2017, 13 March 2020 (Mar. 30, 2022), available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/122/92/PDF/G2012292.pdf?OpenElement>.

is allowed. Of the BRICS states, this Protocol has been ratified only by Brazil, Russia and South Africa.¹⁷ By 2021, the Committee on the Elimination of Discrimination against Women had only considered a single individual complaint against Russia, which concerned the prohibition on women being employed in certain jobs.¹⁸ The consideration of this case led to a number of positive changes in Russian legislation, which will be discussed in the paragraph dedicated to Russian law and jurisprudence.

In recent years, the Committee for the Elimination of Discrimination against Women has reviewed the reports of all the BRICS states and formulated its recommendations on the various issues, which include gender equality in employment. It expressed concerns about the occupational segregation and the persistent gender pay gap with respect to all the BRICS states. All of the countries were urged to counter this segregation by taking measures to improve women's access to employment opportunities and to effectively enforce the principle of equal pay for work of equal value. In terms of country-specific recommendations, Brazil was asked to report on the measures in place to protect women from sexual harassment in the workplace, as this information had not previously been provided.¹⁹ India was criticized for the provisions of the enacted Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, which require conciliation as a preliminary step in the complaint procedure, as well as the absence of an effective complaints mechanism for domestic workers.²⁰ In respect of Russia, it also noted the absence of legislation prohibiting sexual harassment in the workplace and recommended that such norms be adopted, so as to ensure that victims have access to effective remedies.²¹ The last report from China was reviewed in 2014, and in its concluding observations, the CEDAW stressed the need to adopt legal provisions that require employers to assume

¹⁷ See the map of ratifications at the official United Nations (U.N.) site: <https://indicators.ohchr.org/>.

¹⁸ Committee on the Elimination of Discrimination against Women, Communication No. 60/2013, Views adopted by the Committee at its 63rd session (15 February – 4 March 2016), CEDAW/C/63/D/60/2013, 21 March 2016 (Mar. 30, 2022), available at <https://digitallibrary.un.org/record/827494>. See also Women's Rights Body Rules on Russian Banned Jobs List Complaint, U.N. Human Rights Office, 22 April 2016 (Mar. 30, 2022), available at <https://www.ohchr.org/EN/NewsEvents/Pages/MedvedevaVRussia.aspx>.

¹⁹ Committee on the Elimination of Discrimination against Women, Concluding Observations of the Committee on the Elimination of Discrimination against Women, CEDAW/C/BRA/CO/7, 23 March 2012 (Mar. 30, 2022), available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G12/414/40/PDF/G1241440.pdf?OpenElement>.

²⁰ Committee on the Elimination of Discrimination against Women, Concluding Observations on the Combined Fourth and Fifth Periodic Reports of India, CEDAW/C/IND/CO/4-5, 24 July 2014 (Mar. 30, 2022), available at <https://digitallibrary.un.org/record/778815>.

²¹ Committee on the Elimination of Discrimination against Women, Concluding Observations on the Ninth Periodic Report of the Russian Federation, CEDAW/C/RUS/CO/9, 30 November 2021 (Mar. 30, 2022), available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N21/351/83/PDF/N2135183.pdf?OpenElement>.

liability for sexual harassment in workplaces.²² In terms of South Africa, the CEDAW in the recently issued concluding observations emphasized the need to ensure the equal treatment of women care workers and domestic workers, including women migrant workers, who under current norms do not benefit from the same level of protection and benefits as other workers, particularly with regard to minimum wages, paid holidays, maximum weekly hours and regular days of rest, as well as a mechanism for monitoring workplace conditions.²³ This brief review of the CEDAW's concluding observations of the BRICS reports demonstrates that the issue of sexual harassment in the workplace is also a prevalent problem for the majority of the states.

Concerning the ILO's evaluation of the compliance of the BRICS states with non-discrimination conventions, it is necessary to analyze the actions of the CEACR. This Committee was founded in 1926 to examine government reports on ratified conventions.²⁴ When examining the application of international labor standards, the Committee of Experts makes two kinds of comments: observations and direct requests. Observations include comments on fundamental questions raised by the application of a particular convention ratified by a state, whereas direct requests relate to more technical questions or requests for further information.²⁵ The information about the number of direct requests and observations sent to the states under the two ILO Conventions on discrimination is presented by authors in Table 1 below.

Table 1

	Brazil CEACR direct requests/ observations	Russia CEACR direct requests/ observations	India CEACR direct requests/ observations	China CEACR direct requests/ observations	South Africa CEACR direct requests/ observations
C 111	17/20 (since 1991)	15/13 (since 1990)	15/13 (since 1991)	4/1 (since 2004)	7/3 (since 2002)
C 100	14/0 (since 1990)	10/5 (since 1990)	13/17 (since 1991)	10/3 (since 1995)	6/5 (since 2004)

²² Committee on the Elimination of Discrimination against Women, Concluding observations on the combined seventh and eighth periodic reports of China, CEDAW/C/CHN/CO/7-8, 14 November 2014 (Mar. 30, 2022), available at https://www.women.gov.hk/download/whats_news/cedaw_report4_en.pdf.

²³ Committee on the Elimination of Discrimination against Women, Concluding Observations on the Fifth Periodic Report of South Africa, CEDAW/C/ZAF/CO/5, 23 November 2021 (Mar. 30, 2022), available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N21/352/34/PDF/N2135234.pdf?OpenElement>.

²⁴ Committee of Experts on the Application of Conventions and Recommendations, ILO (Mar. 30, 2022), available at <https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/lang-en/index.htm>.

²⁵ Managing International Labour Standards Reporting, Glossary (Mar. 30, 2022), available at <https://managing-ils-reporting.itcilo.org/en/resources/glossary/direct-requests-and-observations>.

Brazil is the leader in the number of observations received under Convention No. 111. In particular, the Direct Request published during the 107th ILC session in 2018²⁶ referred to the amended wording of Article 461 of the Consolidation of Labor Laws (*Consolidação das Leis do Trabalho (CLT)*).²⁷ The CEACR indicated that applying the principle of equal pay should not be limited to the same establishment or employer, as provided for in Article 461 of the *CLT*, and suggested that changes be made to the regulation to make it more comprehensive.

Russia has also received a number of comments from the CEACR. The most recent concern, in particular, is the need to take active steps to prevent and address sexual harassment unemployment,²⁸ as well as revise the list of jobs where the employment of women is prohibited.²⁹ The CEACR also demanded the Russian Government take concrete steps to tackle the issue of the gender pay gap, as well as take appropriate measures to raise public awareness of the relevant legislation and of the procedures and remedies available in relation to equal remuneration.³⁰

The issue of equal pay has been raised by the CEACR in respect of India since 2002. In its most recent observation, it urges the government to take the necessary steps to ensure that the Code on Wages is amended to fully express the principle of equal remuneration for men and women for work of equal value as enshrined in the Convention, and that it is not limited to workers within the same workplace but applies across different enterprises and sectors.³¹ China was urged to include a clear

²⁶ Direct Request (CEACR) – adopted 2017, published 107th ILC session (2018), Discrimination (Employment and Occupation) Convention, 1958 (No. 111) – Brazil (Mar. 30, 2022), available at https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3417489.

²⁷ Altera a Consolidação das Leis do Trabalho (CLT), aprovada pelo Decreto-Lei nº 5.452, de 1º de maio de 1943, e as Leis nº 6.019, de 3 de janeiro de 1974, 8.036, de 11 de maio de 1990, e 8.212, de 24 de julho de 1991, a fim de adequar a legislação às nova 13.467 (2017).

²⁸ Observation (CEACR) – adopted 2018, published 108th ILC session (2019), Discrimination (Employment and Occupation) Convention, 1958 (No. 111) – Russian Federation (Mar. 30, 2022), available at https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3960923.

²⁹ Observation (CEACR) – adopted 2014, published 104th ILC session (2015), Discrimination (Employment and Occupation) Convention, 1958 (No. 111) – Russian Federation (Mar. 30, 2022), available at https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3192118.

³⁰ Observation (CEACR) – adopted 2017, published 107th ILC session (2018), Equal Remuneration Convention, 1951 (No. 100) – Russian Federation (Mar. 30, 2022), available at [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO:13100:P13100_COMMENT_ID:3343611:NO;Observation\(CEACR\)-adopted2014,published104thILCsession\(2015\),EqualRemunerationConvention,1951\(No.100\)-RussianFederation\(Mar.30,2022\),availableathttps://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3187524](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO:13100:P13100_COMMENT_ID:3343611:NO;Observation(CEACR)-adopted2014,published104thILCsession(2015),EqualRemunerationConvention,1951(No.100)-RussianFederation(Mar.30,2022),availableathttps://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3187524).

³¹ Observation (CEACR) – adopted 2020, published 109th ILC session (2021), Equal Remuneration Convention, 1951 (No. 100) – India (Mar. 30, 2022), available at [https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:4055314;Observation\(CEACR\)-adopted2017,published107thILCsession\(2018\),EqualRemunerationConvention,1951\(No.100\)-India\(Mar.30,2022\),availableathttps://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:3340468,102691:NO](https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:4055314;Observation(CEACR)-adopted2017,published107thILCsession(2018),EqualRemunerationConvention,1951(No.100)-India(Mar.30,2022),availableathttps://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:3340468,102691:NO).

and comprehensive definition of discrimination (both direct and indirect) in its labor legislation³² as well as to take specific steps to give full legislative expression to the principle of equal pay for equal work for both men and women.³³ In its most recent observation addressed to South Africa, the CEACR mentioned the adoption of the Code of good practice on equal pay and remuneration for work of equal value on 1 June 2015 as a positive aspect.³⁴ However, none of the observations issued under Convention No. 111 specifically address the problem of gender discrimination in South Africa.

The review of the CEACR comments addressed to the BRICS countries in the last five years demonstrates that the gender pay gap and the segregation of employment, the prohibition of sexual harassment in the workplace and the implementation of the prohibition of gender discrimination in practice are the most crucial issues relevant for almost all of the BRICS states. In the following section, we will examine the national legislation prohibiting gender discrimination in employment, the case law, and the persisting gender stereotypes in the BRICS states.

2. National Approaches to Gender Discrimination in Employment

2.1. Brazilian Law and Case-Law on Discrimination

In Brazil, the reflection of the ratification of CEDAW can be seen in Law No. 7,353 of 29 August 1985³⁵ which created the National Council for Women's Rights (CNDM). This Council aims to eliminate "discrimination against women, ensuring their conditions of freedom and equal rights, as well as their full participation in the political, economic and cultural activities of the country."

Later, in 1988, with the promulgation of the Federal Constitution of the Federative Republic of Brazil,³⁶ non-discrimination again gained constitutional status, both through Article 7's item XX, which guarantees the "protection of the women's labor market, through specific incentives," and through item XXX, which aims to

³² Observation (CEACR) – adopted 2021, published 110th ILC session (2022), Discrimination (Employment and Occupation) Convention, 1958 (No. 111) – China (Mar. 30, 2022), available at https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:4118279.

³³ Observation (CEACR) – adopted 2016, published 106th ILC session (2017), Equal Remuneration Convention, 1951 (No. 100) – China (Mar. 30, 2022), available at https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3298706:NO.

³⁴ Observation (CEACR) – adopted 2015, published 105th ILC session (2016), Equal Remuneration Convention, 1951 (No. 100) – South Africa (Mar. 30, 2022), available at https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO::P13100_COMMENT_ID,P13100_LANG_CODE:3254914,es:NO.

³⁵ Lei nº 7.353 de 29 de agosto de 1985, cria o Conselho Nacional dos Direitos da Mulher – CNDM e dá outras providências (Mar. 30, 2022), available at http://www.planalto.gov.br/ccivil_03/leis/1980-1988/L7353.htm.

³⁶ Constituição da República Federativa do Brasil de 1988 (Mar. 30, 2022), available at http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm.

provide comprehensive protection against the “wage gap, the exercise of duties and admission criteria for reasons of sex, age, color or marital status.”

The norm conveyed by Article 7’s item XX has a general character. It aims to promote specific normative means among employers and/or service providers, such as granting equal working conditions to all people, regardless of gender, in order to reduce the discrimination suffered in the labor market by female workers. Article 7, item XXX, prohibits the practice of exclusionary criteria for admission due to gender, such as the common practice of requiring negative pregnancy tests or sterilization declarations for hiring. It is essential to note that this practice was expressly prohibited in 1995 by Law No. 9,029 of 13 April 1995.³⁷ In the Federal Constitution, Article 5, item I stipulates that “men and women are equal in rights and obligations, under this Constitution,” which also guarantees equal access and respect for normatively guaranteed rights, regardless of gender.

In terms of specific ordinary legislation, on 1 May 1943, Brazil adopted the Consolidation of Labor Law under Decree No. 5,452, which is still in force. The *CLT* is the main body of labor legislation in the private sector in Brazil, and in conjunction with the Brazilian Federal Constitution of 1988, it regulates several labor provisions. Under Article 372 of the *CLT*,

the precepts governing male work apply to women’s work, in which they do not conflict with the special protection established by this Chapter.

Article 377, which also dates back to 1943, states that:

[the] adoption of measures to protect women’s work is considered to be a part of public policy, not justifying, under any circumstances, the reduction of wages.

Thereafter, Law No. 9,799 of 26 May 1999,³⁸ introduced new provisions in the *CLT* to provide more specific protection to women in the labor market against discrimination, through Article 373a, which prohibits: (a) publishing or causing to be published an advertisement for employment in which reference is made to sex, age, color or family situation, except when the nature of the activity to be exercised, publicly and notoriously, so requires; (b) refusing employment, promotion or dismissal from work

³⁷ Lei nº 9.029 de 13 de abril de 1995, proíbe a exigência de atestados de gravidez e esterilização, e outras práticas discriminatórias, para efeitos admissionais ou de permanência da relação jurídica de trabalho, e dá outras providências (Mar. 30, 2022), available at http://www.planalto.gov.br/ccivil_03/leis/19029.htm.

³⁸ Lei nº 9.799 de 26 de maio de 1999, insere na Consolidação das Leis do Trabalho regras sobre o acesso da mulher ao mercado de trabalho e dá outras providências (Mar. 30, 2022), available at http://www.planalto.gov.br/ccivil_03/leis/19799.htm.

on the basis of sex, age, color, family situation or pregnancy, unless the nature of the activity is notoriously and publicly incompatible; (c) considering gender, age, color or family situation as a determinant variable for the purposes of remuneration, professional training and opportunities for professional advancement; (d) requiring a certificate or examination, of any nature, to prove sterility or pregnancy when hiring or keeping a job; (e) preventing access to or adopting subjective criteria for the acceptance of enrollment or approval in competitions in private companies on the basis of sex, age, color, family situation or pregnancy; (f) the employer or agent performing intimate searches on female employees or female workers.

Article 373-A ensures protection against both horizontal and vertical discrimination. Article 390-E, also included in the *CLT* by Law No. 9,799/1999, made it possible for the employer to associate or enter into agreements with “professional training entities, civil societies, cooperative societies, public bodies and entities or trade unions” to develop joint actions “aimed at the execution of projects related to the incentive to women’s work.” According to Article 391, marriage or pregnancy do not constitute just cause for termination of the employment contract.

Finally, Article 461 introduced the rule of equal pay for equal work without distinction of gender, ethnicity, nationality or age. This norm prohibited gender-based wage differentiation, reinforcing the paradigm of the anti-discriminative constitutional principle.

According to Loureiro (2005), discrimination in the labor market can be classified into four different types. These are wage discrimination and employment discrimination, in which women have fewer work opportunities and are, hence, more susceptible to unemployment. Occupation-related discrimination, which restricts women to certain types of employment, frequently with lower wages and worse working conditions, even though they have the productive capacity to perform more complex functions, while the fourth type of discrimination stems from unequal opportunities to access formal education or employment training.

For this study, we will focus on the gender pay gap. A study by the Brazilian Institute of Geography and Statistics (IBGE) based on the 2018 National Continuous Household Sample Survey shows that women earned, on average, 20.5% less than men in all of the occupations that were selected for the study, with the smallest differences among elementary school teachers (9.5% less than male pay) and the largest in the agriculture, retail and wholesale sectors (35.8% and 34% less than men).

Despite the significant wage gap that still exists, there is evidence of a tendency in the country to reduce wage inequalities since, in 2012; the difference in wages was 23.4% on average between salaries. The IBGE study also points out that the difference in the daily workload of men and women has been decreasing. In 2012, the difference was six hours, but by 2018, it had decreased to approximately four hours and forty-eight minutes.

It should be noted, however, that the responsibility for household chores remains a limiting factor for the female sex, as it tends to reduce the employment opportunities feasible for women or steer them toward lower-paying services. Currently, women's workload is nearly twice as high as the workload of men for housework, since 21.4 hours per week are spent by women doing housework, while men devote only 11 hours to housework.

This double day of working and caring for the house makes it difficult to introduce and retain women in the labor market, according to a 2018 IBGE study, because although women over the age of fourteen represent 52.4% of the population, only 43.8% of the 93 million Brazilians who were employed in 2018 were women.

The numbers get even worse when women have children because only 54.6% of women aged 25 to 49 with children up to three years of age were employed in 2019, while the percentage of men in the same condition was 89.2%. In households with children, the percentage of employed women was 67.2%, while the percentage of employed men was 83.4%.

Among the occupations selected for the study, the participation of women was highest among domestic service workers in general, accounting for 95% of the total. This was followed by elementary school teachers (84.0%); interior cleaning workers of buildings, offices, hotels and other establishments (74.9%); and workers of call centers (72.2%).

Professional advancement, in addition to career growth, is also another area where discrimination occurs since women occupy 42.4% of management positions, 13.9% of board positions and 27.3% of superintendence positions, earning on average 61.9% of men's income, according to data from the Ministry of Economy.

What is perceived from all of these data is that there persists in Brazil, both a view that the female gender cannot dedicate themselves both to their professional career and their private lives due to their dual responsibilities, which can be exacerbated with the presence at home of elderly family members and young children, as well as invisible barriers, also known as glass ceilings.

Despite the historical achievements of the feminist movement and the entire existing legal framework, the glass ceiling creates a race with obstacles for women to attain posts with power and responsibility.

The entire protective and encouraging normative framework for equity of access and remuneration between genders has not yet been able to reduce existing inequalities, particularly in regard to access to labor opportunities, including those made available by the State.

The Brazilian state government hires its employees, as a rule, through public tenders, the objective of which is to evaluate personal skills and select the best candidates for the provision of public positions through the verification of the intellectual, physical and psychic capacity of those interested in occupying public positions, with the most qualified candidates always being selected to become part of the Brazilian state body.

However, even after the Federal Constitution of 1988, several public tenders, particularly those in public security, held in the 1990s and 2000s to select officers for the military police, precluded the possibility of registering women, admitting only male candidates. The first post-constitution case of 1988 that reached the Supreme Court on this subject was Extraordinary Appeal No. 120,305,³⁹ which analyzed the case of the State of Rio de Janeiro that prohibited the admission of women to the position of dentists in the corporative body of officers of the Rio de Janeiro Military Police. A candidate approved in this contest was not selected solely due to her gender. She appealed to the Brazilian Supreme Court to have her right to gender equality respected by a sub national entity.

The *ratio decidendi* of the above judgment is as follows.

Public contest – adoption criteria – sex. The rule cites the unconstitutionality of the sex-specific admission criteria considered sex-specific in Article 5, item I, and para. 2, as well as in Article 39 of the Federal Charter. The only exception is the account of acceptable hypotheses given by the socio-constitutional order. Thus, the public tender for filling vacancies existing for Military Police Officers, in the Health Board (first lieutenant, doctor and dentist) falls under the constitutional rule, which prohibits the sex discrimination.

A second, more recent case occurred in the 2000s when the public tender for the Training Course of Officers of the Military Police of the State of Mato Grosso do Sul indicated that only male candidates would be considered for job vacancies. Again, it was up to a candidate approved in the contest to file a lawsuit before the Supreme Court in order to guarantee that they had the right to be legally accepted and appointed to the Brazilian state staff. The Brazilian courts debated the extent to which discrimination harmed or did not harm the principle of isonomy and gender equality and the Superior Court of Justice (*Superior Tribunal de Justiça (STJ)*) concluded in its ruling for this case that:

Undoubtedly, there can be no distinction, in the face of the principle of isonomy, of human rights, although, by nature itself, certain activities are proper for men or more recommended for women. Thus, for example, access is provided to military careers. Today, in that contest, the deliberation of the State needs people in activities recommended for men and not for women. In so, I do not see that the simple distinction can confront the principle of isonomy.⁴⁰

³⁹ Extraordinary Appeal No. 120,305 – Rio de Janeiro, tried on 8 September 1994, of rapporteurs of Minister Marco Aurélio de Mello.

⁴⁰ Luis Vicente Cernicchiaro, *State of Mato Grosso do Sul, of the Rapporteurs* (1999) (Mar. 30, 2022), available at https://processo.stj.jus.br/processo/ita/documento/mediado/?num_registro=199800315560&dt_publicacao=22-03-1999&cod_tipo_documento=&formato=PDF.

The Supreme Federal Court, the highest court of the Brazilian Judiciary, in turn, disagreed with the judgment of the Superior Court of Justice and reaffirmed that:

it is an illegitimate requirement when it establishes a prescription for the positions to be filled by public tender without legal basis and reasonableness in the criterion of fixing the activities to be performed.⁴¹

It is still important to note that, according to the judgment of the Federal Supreme Court, “the imposition of gender requirements” in public tender notices is compatible with the Federal Constitution only in exceptional cases, such as when the proportional reasoning and legality of the imposition are due to specific characteristics of the work to be performed, such as the physical lifting of heavy loads. As a result, the restriction must be both justified and proportionate.

In this sense, the sheer restriction, without motive and regardless of any criterion, to restrict women from serving in the military police violated the principle of equality.

During the trial of Extraordinary Appeal No. 528,684, Mato Grosso do Sul, Minister Carmen Lucia, a former president of the 2nd Panel of the Supreme Court, made a point of declaring in her vote:

Here, what seems to have been discrimination is why women did not come in, and there is a somewhat strong phrase for us, especially: “that some activities are proper for men, some for women.” They have already said this, here, in this Supreme Court: that you could not let a woman in. One of the reasons – and the speech is from 1998, was that Supreme Court was not fit for women because there was not even a female toilet, which was something impressive to be said, and said seriously. I also accompany Minister Gilmar, just saying this: for me, when you have in the Constitution that everyone is equal in the law – despite the expression before the law it is in the law – does not mean that sex, color, age cannot be legitimate, constitutional discriminatory factors. They can! If a career is a career for female police officers, there would be no unconstitutionality for certain activities that are legally provided for this. Only here, you forbade yourself for forbidding. The case is prejudiced, constitutionally fenced.

This statement is significant because it demonstrates the difficulty of admittance and professional advancement of women, even in public office, given that the Brazilian Supreme Court, which consists of eleven ministers, included a woman in this case, Minister Ellen Gracie Northfleet, appointed on 23 November 2000.

⁴¹ Gilmar Mendes, *State of Mato Grosso do Sul, of the Rapporteurs* (2013), at 13 (Mar. 30, 2022), available at <https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=4927133>.

It is important to note that both of the judgments that were analyzed were delivered by the highest instance of the Brazilian Judiciary, after having been processed by all of the different judicial bodies. Many more cases do not reach the Supreme Court and are not even judicialized, making it difficult to verify the true extent of discrimination in Brazilian public tenders. However, it is believed that public tenders that formerly excluded applicants based on gender from accessing job vacancies have been phased out in recent years. On the other hand, new means of making it difficult to access job vacancies have arisen, such as the requirement of specific health examinations for women or offering a smaller number of vacancies compared to the number of vacancies available to men.

An example of the above can be found in the public tender that was held by the Military Police of the state of Rio Grande do Norte in 2018. After going thirteen years without holding a public tender, it made available a public selection with 1,000 vacancies, 938 for men and 62 for women, which is equivalent to only 6% of the total, in a state of the Brazilian federation, which according to the last IBGE study (2010) on the subject, had 51.11% of its population made up of women. Another example is complementary law no. 194/2012 of the state of Roraima, which establishes the Statute of the Military of the State of Roraima, reserving to women the maximum percentage of 15% of the vacancies offered in the public tender for admission to the Military Police and the Roraima Fire Department, despite the fact that 49.8% of its population is composed of women (IBGE, 2010).

Regarding specific women's health examinations, several public tenders (Federal District in 2016, São Paulo in 2015, among others) required the examination of the invasive pap smear, which is performed by the removal of material from the cervix for later analysis. Without this examination, candidates who had intact hymens were required to present a certificate of virginity that included the signature, stamp and registration of the gynecologist who issued it. It has been proven that such public tenders did not require equivalent examinations for male candidates, and it has also been proven that finding changes in the first pap smear examination is not sufficient to diagnose the existence or severity of a disease.

In this context, considering that the examination does not provide a definitive result, either positive or negative, the question that needs to be asked, and that the Brazilian courts are currently addressing, is whether the existence of any minor injury or illness, even if treatable, would be sufficient to bar a candidate from entering public service, using the justification that the candidate would not be able to perform the tasks and responsibilities of the desired position.

Thus, the core of the current legal question is to determine the limits of the reasonableness of specific requirements. such as the imposing of the performance of certain medical examinations on one sex while not requiring them from members of the other sex; and measuring the extent to which these medical examinations are capable of hindering the exercise of public functions; applying the same reasoning

for the limitation of female vacancies in police forces and questioning whether it is reasonable and non-discriminatory to limit access to people, solely on their gender and not on their competence or aptitude for the work.

The advances observed in Brazil regarding the reduction of gender inequalities in the Brazilian labor market are due to the public and legislative policies that reinforced both the inclusion and retention of the female gender in work, as well as their protection. We believe that this strategy, along with educational and incentive initiatives developed by the third sector, should be continued in order to dispel myths and increase social and legal awareness.

The authors of this paper believe that actions based on voluntarism by companies aimed at reducing gender discrimination are very fragile, as has already been pointed out (Tilly, 1999; Kalev and Dobbin, 2006; Greene, Kirton, and Wrench, 2005). This requires the State to take the lead in imposing or encouraging cultural changes in companies, which, once changed, will reduce inequality.

In this regard, the development of national legislation requiring both the elimination of gender-based vacancy distribution or, if necessary, the setting of a minimum percentage of vacancies for the female gender, as well as the prohibition of invasive medical examinations that can not only cause embarrassment but also do not necessarily prevent the exercise of official duties, is a crucial step toward reducing the obstacle of access to jobs in the public sector. The establishment of fines to combat the wage-disparity between men and women in Brazil, such as those established by Bill No. 130/2011, combined with female-only labor training programs aimed at specific sectors with open jobs, such as the technology sector, and the improved performance of unions, can strengthen existing initiatives to reduce inequalities.

In order to reduce the effects of the glass ceiling, the creation of tools and monitoring by third-party entities, with gender cutouts and position indicators added to the stimulation of stakeholders so that equality and equity in professional development and career advancement within the company are observed, are essential steps that can be adopted gradually with another affirmative action that is already in place or being created.

We believe that the entire society is responsible for addressing inequalities, and that this is a collective project, which will only achieve its ultimate goal, that of establishing equality, when there is a clear understanding of our roles in deconstructing the historically constituted social disparities. This is the only way to achieve the expected of the 2030 Sustainable Development Goal No. 5.

2.2. Regulation of the Prohibition of Discrimination in Russia

Overcoming discrimination is a priority of the state policy of the Russian Federation. The Russian Constitution guarantees the equality of rights and freedoms of everyone regardless of their social status, employment position, or gender, in particular. Men and women have equal rights and freedoms and equal opportunities

(secs. 2 and 3 of Art. 19). The Constitution also guarantees protection of motherhood and the family by the State. The care and upbringing of children is an equal right and obligation of both parents (secs. 1 and 2 of Art. 38).⁴²

In the sphere of employment, the state pursues the policy of ensuring equal opportunity for all citizens of the Russian Federation, regardless of gender.⁴³ The Labor Code of the Russian Federation prohibits discrimination in labor relations. No one may be deprived of their labor rights and freedoms or receive any benefits based on their race, color of skin, nationality, language, origins, property, social or positional status, age, domicile, religious beliefs, political convictions, affiliation or non-affiliation with public associations, as well as other factors not relevant to the professional qualities of the employee. Pregnant women and persons with family responsibilities are provided with guarantees when an employment contract is executed or terminated at the initiative of the employer (Arts. 3, 64, 261 of the Labor Code of the Russian Federation).⁴⁴ Both the Administrative and Criminal Codes provide for liability for discrimination. However, administrative and criminal liabilities for gender discrimination are seldom pursued.⁴⁵

The government has taken measures to increase the competitiveness of women in the labor market. Job advertisements containing requirements about gender, age or marital status are prohibited. An employer does not have the right to request information about an employee's age, marital status and parental status when hiring an employee. The number of jobs prohibiting the use of women's labor has been reduced. The level of remuneration is gradually increasing in the budget sectors of the economy, which employ mainly women. These sectors include education, science, culture and healthcare. Women on parental leave can receive vocational training provided by employment agencies.

⁴² Конституция Российской Федерации (принята всенародным голосованием 12 декабря 1993 г.) (с учетом поправок, внесенных Законами РФ о поправках к Конституции РФ от 30 декабря 2008 г. № 6-ФКЗ, от 30 декабря 2008 г. № 7-ФКЗ, от 5 февраля 2014 г. № 2-ФКЗ, от 21 июля 2014 г. № 11-ФКЗ) // Собрание законодательства РФ. 2014. № 31. Ст. 4398 [Constitution of the Russian Federation (adopted by a nationwide vote on 12 December 1993) (considering amendments, introduced by the RF Laws on amendments to the RF Constitution of 30 December 2008 No. 6-FKZ, of 30 December 2008 No. 7-FKZ, of 5 February 2014 No. 2-FKZ, of 21 July 2014 No. 11-FKZ), Legislation Bulletin of the Russian Federation, 2014, No. 31, Art. 4398], Art. 19.

⁴³ Закон Российской Федерации от 19 апреля 1991 г. № 1032-1 «О занятости населения в Российской Федерации» // Бюллетень нормативных актов РСФСР. 1992. № 1. С. 4–18 [Law of the Russian Federation No. 1032-1 of 19 April 1991. On Employment of the Population in the Russian Federation, Bulletin of Normative Acts of the RSFSR, 1992, No. 1, p. 4].

⁴⁴ Трудовой кодекс Российской Федерации от 30 декабря 2001 г. № 197-ФЗ // Собрание законодательства РФ. 2002. № 1 (ч. 1). Ст. 3 [Labor Code of the Russian Federation No. 197-FZ of 30 December 2001, Legislation Bulletin of the Russian Federation, 2002, No. 1 (part 1), Art. 3], Arts. 3, 64, 261.

⁴⁵ Новиков В.А. Дискриминация: преступление и административное правонарушение // Актуальные проблемы российского права. 2017. № 3(76). С. 168–174 [Valery A. Novikov, *Discrimination: Crime and Administrative Offense*, 3(76) Actual Problems of Russian Law (2017)].

According to the Federal State Statistics Committee of the Russian Federation,⁴⁶ the workforce number amounted to 75.0 million people in October 2020. At the same time, the employment rate for men was 66.1%, while for women it was 51.7%. The unemployment rate for women (6.4%) is 0.3% higher than the unemployment rate for men (6.1%). The average job search period lasted 6.4 months as of October 2020. Compared to men, women looked for a job for 0.2 months longer on average. In 2019, the largest number of men was employed in manufacturing (6291 thousand people), transportation and storage (4815 thousand people) and construction (4815 thousand people). Women worked mainly in trade (7133 thousand people), education (5662 thousand people), healthcare and social services (4550 thousand people). The number of women with higher education has been higher than men. However, women make up the vast majority of workers employed in low-skilled and low-paid jobs in various areas of the public and the private sectors of the economy. The wage gap between men and women is 27.9%.

The unequal distribution of women and men in the field of employment has many causes. Occupational gender segregation is caused by the biological and psychological differences between men and women. Men are more likely to work in physically demanding, harmful or risky jobs, such as miners, firefighters and movers, whereas women are most likely to be employed as nurses, educators and primary school teachers. A woman is responsible for the majority of the family responsibilities, such as caring for children and disabled family members. This is due to the historically patriarchal gender stereotype that a woman should focus on her family and child care, while a man should provide for the family.

According to a survey by the Analytical Center of the National Agency for Financial Research (NAFI) Analytical Center in 2020, stereotypes are reinforced by the images of successful men and women in the media, popular culture, and politics. In the course of the survey, Russians named male leaders among the most successful people in Russia (83%). The dominance of male images is especially noticeable in politics, business and the digital economy. Women are more often associated with success in show business (33% of female names). However, even in this context, women are mentioned far less frequently than men. 15% of Russians work in the digital economy. The number of men and women in this field is nearly equal, with 52% and 48%, respectively. Nevertheless, women are more likely to be employed as sellers, managers and operators. Men are more likely to hold positions as engineers, programmers and system administrators. According to experts, this is due to gender stereotypes.

This perception is largely influenced by social consciousness, upbringing and family life. The majority of Russians (71%) think that the main role of a woman is to

⁴⁶ Статистический сборник «Труд и занятость в России» / Федеральная служба государственной статистики. 2019 [Federal State Statistics Committee of the Russian Federation, Statistical Collection "Labor and Employment in Russia" (2019)] (Mar. 30, 2022), available at https://rosstat.gov.ru/storage/mediabank/Trud_2019.pdf.

be a mother and a housewife. 89% of the respondents believe that a man should provide for his family; only half of them (45%) agree that a woman should provide for herself. Many Russians (35%) assume that a woman should choose between a career and a family; this point of view is more common among those who already have children.⁴⁷

Both employees and employers have a similar perspective on the different life priorities that men and women have, as well as the different roles men and women play in the context of labor relations. Employment practices and the way vacancies are categorized according to gender are both influenced by gender stereotypes. This is also a cause of discrimination.⁴⁸ It is much more difficult to prove the existence of a gender preference than it is to prove that an applicant's skills are mismatched.⁴⁹

The analysis of judicial practice has demonstrated that employers frequently refuse to hire pregnant women, women with young children, and mothers with many children. However, women rarely seek court protection in these cases. It is rather difficult to prove the fact of discrimination in the case of denial of employment. Employers justify denial of employment not on the basis of gender preferences but on the basis of the professional qualities of the applicant, which is a valid reason under Russian labor legislation.

Men are more likely to petition the court for protection from gender discrimination when they are denied a job during telephone negotiations due to the fact that the position is for females.⁵⁰ A ruling that was handed down in 2013 by the Zamoskvoretsky District Court of Moscow is an example of such a situation. The defendant (the employer) placed an ad in the newspaper that a woman was required for the position of deputy director. The plaintiff, who was male, called the employer and was denied the job. The Court concluded that these actions were lawful since the announcement did not limit the plaintiff's ability to take this position. The telephone call made by the plaintiff to the number indicated in the advertisement and the explanation of the

⁴⁷ Стереотипы в отношении женщин и их социально-экономические последствия / Аналитический центр Национального агентства финансовых исследований. 2020 [Analytical Center of the National Agency for Financial Research, Stereotypes Against Women and their Socio-Economic Consequences (2020)] (Mar. 30, 2022), available at <https://nafi.ru/analytics/stereotipy-v-otnoshenii-zhenshchin-i-ikh-sotsialno-ekonomicheskie-posledstviya/>.

⁴⁸ Козина И.М. Профессиональная сегрегация: гендерные стереотипы на рынке труда // Социологический журнал. 2002. № 3. С. 126–136 [Irina M. Kozina, *Professional Segregation: Gender Stereotypes in the Labor Market*, 3 Sociological Journal 126 (2002)] (Mar. 30, 2022), also available at <https://www.jour.fnisc.ru/index.php/socjour/article/view/759>.

⁴⁹ Лютов Н.Л., Герасимова Е.С. Дискриминация в сфере труда: вопросы эффективности норм и правоприменительной практики // Актуальные проблемы российского права. 2016. № 3(64). С. 100–108 [Nikita L. Lyutov & Elena S. Gerasimova, *Discrimination in the Sphere of Labor: Issues of the Effectiveness of Norms and Law Enforcement Practice*, 3(64) Actual Problems of Russian Law 100 (2016)].

⁵⁰ Judgment of Kalininsky District Court of Chelyabinsk of 18 February 2019, Case No. 2-1167/2019; Judgment of Oktyabrsky District Court of Krasnodar of 3 December 2019, Case No. 2-4490/2019.

defendant's employee that women were required for this position did not constitute a refusal to hire the plaintiff and did not indicate gender discrimination.⁵¹ As a result, since 2014, placing ads with a discriminatory tone has been prohibited.

The practice of a court recognizing discrimination is very rare, except in cases where the employer provides the reason for refusal on the basis of gender discrepancy in person and in writing at the meeting. The Volzhsky District Court of Saratov recognized discrimination in one such case concerning the refusal to hire a hostess. The employer refused to hire the applicant due to "non-compliance with the gender requirement" as indicated in a written document submitted during the job interview.⁵²

A striking manifestation of hidden gender discrimination is the selection of applicants for employment by private recruitment agencies and employers using information technology tools. Private recruitment agencies ask employers to complete a questionnaire, which includes a section on "gender." As a result, job applications that do not meet gender requirements are automatically excluded using a computer program and never reach employers. Discriminated persons are unaware that they are even being discriminated against since the application based selection mechanism is not available to them. Article 13.11.1 of the Code of Administrative Violations of the Russian Federation establishes administrative liability only for the dissemination of information about vacant jobs containing discriminatory restrictions. Both criminal and administrative liabilities for gender discrimination are ineffective. Therefore, liability for the use of discriminatory mechanisms should be established. The Unified Digital Platform in the Field of Employment and Labor Relations "Work in Russia," which was introduced in November 2021, can contribute to overcoming gender discrimination in electronic employment since this platform operates under the control of the state.

The judicial practice of proving the discriminatory nature of lists prohibiting the use of women's labor in heavy work deserves attention. For example, Anna Klevets applied for the training course for assistant train drivers provided by the State Unitary Enterprise "St. Petersburg Metro." The Constitutional Court of the Russian Federation refused to hear her complaint, citing the List of Jobs with Unhealthy and/or Dangerous Work Conditions, Prohibiting Female Labor.⁵³

⁵¹ Judgment of Zamoskvoretsky District Court of Moscow of 20 June 2013, Case No. 2-2577/2013.

⁵² Judgment of Volzhsky District Court of Saratov of 18 December 2018, Case No. 2-4222/2018.

⁵³ Определение Конституционного Суда Российской Федерации от 22 марта 2012 г. № 617-О-О «Об отказе в принятии к рассмотрению жалобы гражданки Клевцев Анны Юрьевны на нарушение ее конституционных прав частями первой и третьей статьи 253 Трудового кодекса Российской Федерации и пунктом 374 раздела XXX Перечня тяжелых работ и работ с вредными или опасными условиями труда, при выполнении которых запрещается применение труда женщин» // СПС «КонсультантПлюс» [Ruling of the Constitutional Court of the Russian Federation No. 617-O-O of 22 March 2012. On the Refusal to Consider the Complaint of the Citizen Anna Yu. Klevets on Violation of Her Constitutional Rights by Parts 1 and 3 of Article 253 of the Labor Code of the Russian Federation and Paragraph 374 of Section XXX of the List of Jobs with Unhealthy and/or Dangerous Work Conditions,

The opposite case is the Buguruslan City Court's decision to remove the discriminatory clause from "Flight College's" admissions policies. The applicant, Ksenia Borisova, sought to enroll at Flight College in the city of Buguruslan, Orenburg region, but the admissions policies stated that only males were recruited to the flight college. The Buguruslan City Court found the actions of Buguruslan Flight College contrary to the law.⁵⁴

The case of Svetlana Medvedeva also deserves attention. She applied for a post as a navigation officer aboard a motor ship in the Samara River Passenger Enterprise. Medvedeva had the required qualifications, but she was refused since women are not permitted to work as navigation officers under current legislation. This prohibition was provided for in the List of Jobs with Unhealthy and/or Dangerous Work Conditions, Prohibiting Female Labor. After being denied in the courts of the Russian Federation, S. Medvedeva filed a complaint about the violation of the Convention on the Elimination of All Forms of Discrimination against Women with the U.N. Committee on the Elimination of Discrimination against Women.⁵⁵ The Committee on the Elimination of Discrimination against Women of the Russian Federation recommended Svetlana Medvedeva be provided access to jobs for which she has the appropriate qualifications. The Supreme Court of the Russian Federation sent the case of Svetlana Medvedeva for a new hearing to the Court of First Instance. The Samara District Court of Samara recognized the decision of Samara River Passenger Enterprise to refuse to conclude an employment contract with Medvedeva on the grounds of prohibiting the use of women's labor in harmful jobs as gender discrimination. However, the Court refused the claim to conclude an employment contract due to the absence of appropriate working conditions.⁵⁶

In 2019, as a consequence of the abovementioned judicial practice, the Ministry of Labor and Social Protection of the Russian Federation adopted a new List of Jobs with Unhealthy and/or Dangerous Work Conditions, Restricting Female Labor. This List has been reduced by more than four times. For example, restrictions have been lifted for women in the following professions and jobs: as a driver of heavy trucks and agricultural machinery, except for machinists of construction equipment; a member of the ship's deck crew (such as boatswain, skipper or sailor) except for work in the ship's engine room; and a driver of electric trains and high-speed trains.

Another form of gender discrimination is the granting of leave only to women in law enforcement and military duty. The European Court of Human Rights has a significant

Prohibiting Female Labor, SPS "ConsultantPlus"] (Mar. 30, 2022), available at http://www.consultant.ru/document/cons_doc_LAW_129887/#:~:text=Новости-Определение%20Конституционного%20Суда%20РФ%20от%2022.03.2012%20N%20617-О,и%20работ%20с%20вредными%20или.

⁵⁴ Judgment of Buguruslan City Court of 16 November 2006, Case No. 2-775/2006.

⁵⁵ Opinion of the U.N. Committee on the Elimination of Discrimination against Women in the case of *Medvedeva v. Russia*.

⁵⁶ Judgment of Samara District Court of 15 September 2017, Case No. 2-1885/2017.

influence on judicial practice in these matters. The judgment of the European Court of Human Rights in the case of *Konstantin Markin v. Russia* on 22 March 2012 is one example.⁵⁷ The applicant, who had a military service contract, applied for a three-year parental leave as he was the sole caregiver of three young children. But he was refused, because the law provides a three-year parental leave only to female military personnel. The Courts of the Russian Federation refused him, citing the specific nature of military duty. The European Court agreed that, given the importance of the army for the protection of national security, certain restrictions on the provision of parental leave may be justified if they are not discriminatory. However, there may be other ways to achieve the legitimate goal of protecting national security other than providing parental leave only to female military personnel.

A similar situation developed in the case of *Gruba and Others v. Russia and the European Court of Human Rights* on 22 November 2021.⁵⁸ The applicants were both working as police personnel. They asked their superiors for parental leave, but their requests were denied because parental leave could be granted to a policeman only if his children were left without maternal care. The European Court of Justice concluded that the difference in treatment between male and female police personnel regarding the entitlement to parental leave cannot be called reasonable and objectively justified. The Court held that there was no reasonable relationship of proportionality between the legitimate aim of maintaining the operational effectiveness of the police and the difference in treatment. In this regard, the difference in treatment received by the applicants amounted to gender discrimination.

There is a practice of appealing to the court against gender discrimination in the provision of child care benefits and guarantees in case of dismissal. For instance, the Mosenergo Organization provided the child care allowance only to women. In 2017, the Moscow City Court recognized this condition to be discriminatory.⁵⁹

The Constitutional Court of the Russian Federation declared the provision of guarantees in case of dismissal only to women unconstitutional in the case of *A. Ostaev*.⁶⁰ The applicant was the father of three young children, one of whom was under the age of three, and another was disabled. The applicant's wife did not work and took care of

⁵⁷ European Court of Human Rights (Grand Chamber), *Konstantin Markin v. Russia*, Judgment, Application No. 30078/06, 22 March 2012.

⁵⁸ European Court of Human Rights (Third Section), *Gruba and Others v. Russia*, Judgment, Applications Nos. 66180/09 et al., 22 November 2021.

⁵⁹ Appeal Ruling of Moscow City Court of 4 December 2017, Case No. 33-45444/17.

⁶⁰ Постановление Конституционного Суда Российской Федерации от 15 декабря 2011 г. № 28-П «По делу о проверке конституционности части четвертой статьи 261 Трудового кодекса Российской Федерации в связи с жалобой гражданина А.Е. Остаева» // СПС «КонсультантПлюс» [Resolution of the Constitutional Court of the Russian Federation No. 28-P of 15 December 2011. On the Case of Checking the Constitutionality of the Fourth Part of Article 261 of the Labor Code of the Russian Federation in Connection with the Complaint of Citizen A.E. Ostaev, SPS "ConsultantPlus"] (Mar. 30, 2022), available at http://www.consultant.ru/document/cons_doc_LAW_123657/.

the children. Despite this, he was dismissed due to staff redundancy since guarantees were provided only to women. The fact that such a condition was challenged before the Constitutional Court of the Russian Federation has resulted in improvements to judicial practice and contributed to overcoming gender discrimination. Nevertheless, gender discrimination in employment, mainly due to gender stereotypes, is fairly common.

The Government of the Russian Federation has adopted the National Strategy of Actions for Women for 2017–2022, as well as the Concepts of the State Family Policy and the Demographic Policy for the period up to 2025. These documents indicate that motherhood, as a social role of women, is highly valued by the state and society. The expansion of the scope of flexible forms of employment in the digital economy promotes balancing work with family responsibilities while also contributing to overcoming gender discrimination, opening up wide opportunities for online learning, distance work and business building. The creation of conditions for the full and equal participation of women in the workforce as well as the improvement of human rights mechanisms against gender discrimination should be a priority of state policy.

It is necessary to raise society's awareness about the means of protecting rights in cases of discrimination and to establish responsibility for the use of discrimination mechanisms by recruitment agencies in online hiring. The government needs to take not only legal, but also political, social and economic measures to overcome gender discrimination and gender stereotypes, as well as work with employers and trade unions on these issues.

2.3. Legal Provisions and the Case-Law on Gender Discrimination in India

Gender discrimination in employment and education has plagued developing nations by capping their economic and social productivity, and India is no exception to this phenomenon. In India, women are discriminated against and often even barred from labor markets because of prevailing restrictive social norms. Even though more than 48% of the population in India⁶¹ is comprised of women, gender-based discrimination continues to be a lived reality for millions of women across the subcontinent despite the presence of stipulated legislative measures. Gender-based discrimination usually manifests as unpaid maternity leaves, pay gaps and even sexual harassment and violence in the workplace. As a result, there has been a consistent drop in the female labor force participation rate over the years, from 30.27% in 1991 to 20.79% in 2019.⁶² The following section provides an insight into the various legislative measures in India that seek to protect women in the labor market from exploitation. Furthermore, it analyses the different government frameworks

⁶¹ Population, female (% of total population) – India, The World Bank (Mar. 30, 2022), available at <https://data.worldbank.org/indicator/SP.POP.TOTL.FE.ZS?locations=IN>.

⁶² Labor force participation rate, female (% of female population ages 15+) (modeled ILO estimate) – India, The World Bank (Mar. 30, 2022), available at <https://data.worldbank.org/indicator/SL.TLF.CACT.FE.ZS?locations=IN>.

that govern such laws and the extent to which the legal bodies in the State enforce them. Finally, it discusses the various forms of discrimination, as well as the ways in which legislation and society can efficiently address them.

Since its inception, India has been a member of the International Labour Organisation and has ratified the vast majority of its conventions related to equal employment and remuneration in the workplace, as well as those protecting women.⁶³ India has also been at the forefront of adopting recommendations from the ILO. The Indian Government has passed several national laws to encourage women's participation in the workforce and protect them from discriminatory practices in the workplace:⁶⁴

- Equal Remuneration Rules were passed in 1976 (amended in 1987);⁶⁵
- National Commission of Women Act was passed in 1990;⁶⁶
- Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act was passed in 2013;⁶⁷
- Codes on Wages was passed in 2019;⁶⁸
- Maternity Benefit (Amendment) Act of 2017 marked a significant change in maternity leave from 12 weeks to 6 months.⁶⁹

Gender discrimination in the workplace is frequently attributed to gender stereotypes and cultural factors. Cultural restrictions have affected female labor force participation rates, as well as manifested themselves as discrimination in employment and wages offered to women.⁷⁰ Gender segregation at work, coupled with society's devaluation of women's paid work, leads not only to opportunity gaps but gender pay gaps as well.⁷¹ Moreover, these stereotypes are concretized due to the lack of human capital and its adverse repercussions. Due to traditional

⁶³ India, ILO (Mar. 30, 2022), available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11110:0::NO::P111110_COUNTRY_ID:102691.

⁶⁴ *Id.*

⁶⁵ Equal Remuneration Rules, 1976 (Mar. 30, 2022), available at <https://labour.gov.in/sites/default/files/Equal%20Remuneration%20Rules,%201976.pdf>.

⁶⁶ National Commission for Women Act, 1990 (No. 20 of 1990) (Mar. 30, 2022), available at <http://ncw.nic.in/Acts-and-rules/national-commission-women-act-1990-act-no-20-1990-govtof-india>.

⁶⁷ Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (Mar. 30, 2022), available at <https://legislative.gov.in/sites/default/files/A2013-14.pdf>.

⁶⁸ Code on Wages, 2019 (No. 29 of 2019) (Mar. 30, 2022), available at <https://egazette.nic.in/WriteReadData/2019/210356.pdf>.

⁶⁹ Maternity Benefit (Amendment) Act, 2017 (No. 6 of 2017) (Mar. 30, 2022), available at <https://labour.gov.in/sites/default/files/Maternity%20Benefit%20Amendment%20Act%2C2017%20.pdf>.

⁷⁰ John T. Dunlop, *The Task of Contemporary Wage Theory in The Theory of Wage Determination* 3 (John T. Dunlop ed., 1957); Millie Nihila, *Marginalisation of Women Workers: Leather Tanning Industry in Tamil Nadu*, 34(16/17) *Econ. & Pol. Wkly.* WS21 (1990).

⁷¹ Barbara F. Reskin and Denise D. Bielby, *A Sociological Perspective on Gender and Career Outcomes*, 19(1) *J. Econ. Persp.* 71 (2005).

societal factors, women reported relatively low chances of productivity-increasing possibilities like formal schooling, tertiary education, or on-the-job training. Even if women are able to obtain a primary education or a secondary education, for that matter, the quality of education they receive is often inferior as compared to that received by men.⁷² Human capital factors determine the opportunity and pay gap, as well as workplace experience.⁷³ This is especially true for women in India, where the literacy rate is as low as 65.79%.⁷⁴ Furthermore, traditional barriers placed by social and institutional factors restrict women from pursuing specific career paths. Studies also demonstrated that discriminatory practices in child-rearing or choices made for education are the primary sources of pre-market discrimination that had unfavorable effects on women's employment and wages.⁷⁵ Moreover, the traditional division of labor and discrimination in employment manifest a vicious cycle that is inescapable for women who find themselves in the lower strata of society and have relatively lower cultural and social capital. The existing gender discrimination in the labor market in India demonstrates counter-cyclical effects. The fact that women face significant discrimination in employment stimulates families to reallocate their economic and time resources as per the comparative advantage to parents (based on the traditional division of labor). Therefore, it is observed that men allocate more time to market work and women to non-market work.

Moreover, the traditional division of labor leads to occupational segregation between men and women. Because societies across the globe, developed or developing, consider unpaid care and household work to be primarily a woman's job, women only find job opportunities in similar work.⁷⁶ Thus, it is not surprising to see women overrepresented in vocations such as nursing, nannies, domestic workers, kindergarten teachers and so on. Unfortunately, the choice of occupation or employment is often not determined by women for themselves.

Nevertheless, in the majority of circumstances, employers favoured men over women.⁷⁷ Moreover, marital status plays a role in selecting a job and role. Not only

⁷² Biju Varkkey et al., *Indian Labour Market and Position of Women: Gender Pay Gap in the Indian Formal Sector*, IDEAS/RePEc (2017) (Mar. 30, 2022), available at <https://ideas.repec.org/p/ess/wpaper/id12031.html>; The World Bank, *World Development Report 2012: Gender Equality and Development* (2012) (Mar. 30, 2022), available at <https://openknowledge.worldbank.org/handle/10986/4391>.

⁷³ Barbara Stanek Kilbourne et al., *Returns to Skill, Compensating Differentials, and Gender Bias: Effects of Occupational Characteristics on the Wages of White Women and Men*, 100(3) *Am. J. Soc.* 689 (1994).

⁷⁴ Literacy rate, adult female (% of females ages 15 and above), The World Bank (Mar. 30, 2022), available at <https://data.worldbank.org/indicator/SE.ADT.LITR.FE.ZS?locations=IN>.

⁷⁵ Joseph G. Altonji & Rebecca M. Blank, *Race and Gender in the Labor Market* in *Handbook of Labor Economics* 3143 (Orley C. Ashenfelter & Richard Layard eds., 1999); Thomas D. Boston, *Segmented Labor Markets: New Evidence from a Study of Four Race-Gender Groups*, 44(1) *ILR Rev.* 99 (1990); Varkkey et al., *supra* note 72.

⁷⁶ Varkkey et al., *supra* note 72.

⁷⁷ Gary Dessler & Biju Varkkey, *Human Resource Management* (15th ed. 2018).

married, but unmarried women also face job rejections. Employer's perceptions or preconceived notions about unmarried women, such as quitting the job because of marriage, relocating with their spouse, taking a break in service before and after marriage and so forth, reduce their chances of getting jobs even before they get married.⁷⁸ Furthermore, literature indicates that a woman's need for childcare requirements may lead to gender discrimination in employment. Society, social institutions, and organizations treat motherhood and fatherhood differently. Women with children, and even during the childbearing period, are required to make sacrifices at home and work, referred to as the "motherhood penalty." However, fatherhood affords men a "wage premium." After childbirth, women spend more time doing unpaid care and non-market work, with less time left for leisure and market work. In contrast, men devote more time to market work and leisure. It is disheartening to note that women without (a) child/ren are viewed as "potential mothers" by employers, affecting their job prospects.⁷⁹ Thus, the country's social fabric weaves the path to discrimination in the workplace faced by women and is further reinforced by stereotypes.

This section follows a review of cases that have been heard by both the High Court and the Supreme Court of India. These cases have set a precedent for the legalities of discrimination in the Indian labor market and have created awareness to promote gender equality in the workplace.

*Vishaka v. State of Rajasthan*⁸⁰ is a landmark case in this discourse on gender discrimination and the safety of workplaces, owing to certain laws that were ratified as a direct result of this case. The Writ Petition was filed with the Supreme Court of India following the brutal gang rape of a social worker who was trying to stop a child marriage.⁸¹ However, this incident was just the igniting point and the case ultimately led to the broadening of the framework to include the various threats that women and other marginalized genders are prone to in the context of harassment in the workplace. The petition was filed with the goal of enforcing the rights of women in the workplace that come under the purview of Articles 14, 19 and 21 of the Indian Constitution. The case upheld these articles by laying down a framework called the "Vishaka Guidelines" that demarcated and defined sexual harassment in workspaces and paved the way for legislation to address it. These guidelines now serve as the basis for The Sexual Harassment of Women at the Workplace (Prevention,

⁷⁸ Biju Varkkey & Rupa Korde, *Gender Pay Gap in the Formal Sector: 2006–2013: Preliminary Evidence from Paycheck India Data*, WageIndicator Data Report (2013), at 3 (Mar. 30, 2022), available at <https://wage-indicator.org/documents/publicationslist/publications-2013/gender-pay-gap-in-formal-sector-in-india-2006-2013>.

⁷⁹ Varkkey et al., *supra* note 72.

⁸⁰ *Vishaka and Others v. State of Rajasthan and Others*, (1997) 6 S.C.C. 241 (Mar. 30, 2022), also available at <https://main.sci.gov.in/jonew/judis/13856.pdf>.

⁸¹ *Id.*

Prohibition and Redressal) Act, 2013.⁸² However, there were quite a few criticisms of the upkeep of the Vishaka Guidelines concerning Chapter V of the Act, which stipulates a punishment against the complainant if the complaint is false.⁸³ Critics have argued that such a provision may discourage women from filing a complaint in cases where the offender has the unlawful means to disprove his involvement in the crime.⁸⁴

*State of Maharashtra v. Indian Hotel and Restaurants Association*⁸⁵ was a case involving the bar dancers in Mumbai, who have continued to be a phenomenon since the 1990s. Around 2005, conservative forces, including various women's groups, sparked a controversy surrounding the bars on moral grounds arguing that dancers engaged in dancing should be freed from the "exploitation" that required them to partake in "vulgar" acts of display. The groups further argued that such dancing was degrading to the dancers' dignity and attempted to impose a ban by amending the Bombay Police Act (1951).⁸⁶ After protests and opposition from a number of interest groups, including the Union of the Bar Dancers, the case was finally brought before the High Court, where the ban was deemed unconstitutional. The Supreme Court struck down the ban as well, on the grounds that it was discriminatory towards a particular profession and violated Articles 14 and 19(1)(g) of the Constitution, which grant individuals the fundamental right to "practice a profession and carry on any occupation, trade or business."⁸⁷ Scholars argue that viewing the ruling as a feminist victory against conservative forces overlooks the arbitrariness of the negative moral value placed on bar dancing and sex work⁸⁸ that the ruling failed to address.

*Charu Khurana and Others v. Union of India and Others*⁸⁹ is regarded as one of the most critical judgments passed on gender equality and gender discrimination in India's labor *narrative*. Charu Khurana, a make-up artist, was denied membership by

⁸² D. Ramakrishnan, *Sexual Harassment of Women at Workplaces: Legal Safeguards and Preventive Mechanisms in India*, 6(2) Int'l J. Res. & Analytical Rev. 724 (2019).

⁸³ *Supra* note 67.

⁸⁴ Anagha Sarpotdar, *Examining Local Committees Under the Sexual Harassment of Women at Workplace Act*, LV(20) Econ. & Pol. Wkly 51 (2020) (Mar. 30, 2022), also available at https://www.epw.in/online_issues/8_EPW_Vol_LV_No_20.pdf#page=51.

⁸⁵ *State of Maharashtra v. Indian Hotel and Restaurants Association*, (2019) 3 S.C.C. 429 (Mar. 30, 2022), also available at <https://indiankanoon.org/doc/113334597/>.

⁸⁶ Anna Morcom, *The Cure is Worse than the Disease: Mumbai Dance Bars, and New Forms of Justice in the History of Female Public Performers in India*, 14(4) Cultural & Soc. Hist. 499–512 (2017).

⁸⁷ Fundamental Freedoms Under Article 19 of the Constitution of India (Mar. 30, 2022), available at <http://www.mcrhrdi.gov.in/91fc/coursematerial/pcci/Part3.pdf>.

⁸⁸ Prabha Kotiswaran, *Labours in Vice or Virtue? Neo-Liberalism, Sexual Commerce, and the Case of Indian Bar Dancing*, 37(1) J. L. & Soc. 105 (2010).

⁸⁹ *Charu Khurana and Others v. Union of India and Others*, (2014) S.C.C. Online S.C. 900 (Mar. 30, 2022), also available at <https://indiankanoon.org/doc/8443008/>.

the Cine Costume Make-Up Artists and Hair Dressers' Association of Mumbai since its by-laws only permitted men to be its members.⁹⁰ The Supreme Court held that denying the membership was a form of discrimination on the grounds of gender and violated her fundamental right to equality, employment and a livelihood. Although these fundamental rights are only enforceable by state authorities, the court noted the fact that the by-laws stated the Association's registration as a trade union under the Trade Union Act, 1926. As a result, the by-laws were struck down as violations of Articles 14, 15 and 21 owing to the Association's registration under the Act, and by extension, its recognition as a state authority. Therefore, the case law in this scenario allows and sets a precedent for the horizontal application of fundamental rights as opposed to their restrictive application.⁹¹

*Air India v. Nergesh Meerza*⁹² is a case that focuses on the constitutionality of Regulations 46 and 47 of the Air India Employee Service Regulations. According to the regulations, air hostesses have to retire if (i) they reach 35 years of age (extendable up to 45 years at the discretion of the Managing Director), (ii) they get married, or (iii) upon first pregnancy.⁹³ These conditions did not apply to men in the same position of work. Moreover, the terminology used for men in the service regulations was "Air Flight Pursuers" to demarcate the difference. To understand the distinction between the roles of air hostesses and air flight pursuers, the court used the service conditions as a metric to determine whether the air hostesses were discriminated against by being forced into retiring at a relatively early age as opposed to their male counterparts.⁹⁴ After noting that air hostesses and air flight pursuers are different in terms of not only their gender but also in terms of their service conditions and (consequently) grades of pay and promotions, the court concluded that they constitute distinct employment categories. Article 14 guarantees "like treatment to individuals alike" and by extension, treating people who are different in different ways does not amount to discrimination.⁹⁵ To that extent, retirement conditions for air hostesses were held valid and reasonable under Article 14. However, the retirement condition pertaining to the age of air hostesses

⁹⁰ *Khurana and Others v. Union of India and Others*, Legal Information Institute (Mar. 30, 2022), available at https://www.law.cornell.edu/women-and-justice/resource/charu_khurana_and_others_v_union_of_india_and_others.

⁹¹ Jayna Kothari, *Rights Protection in 2014: A Review of the Indian Supreme Court*, Oxford Human Rights Hub, 29 January 2015 (Mar. 30, 2022), available at <https://ohrh.law.ox.ac.uk/rights-protection-in-2014-a-review-of-the-indian-supreme-court/>.

⁹² *Air India v. Nergesh Meerza*, A.I.R. 1981 S.C. 1829 (Mar. 30, 2022), also available at <https://indiankanoon.org/doc/1903603/>.

⁹³ *Air India v. Nargesh Meerza*, Legal Information Institute (Mar. 30, 2022), available at https://www.law.cornell.edu/women-and-justice/resource/air_india_v_nargesh_meerza.

⁹⁴ Shreya Atrey & Gauri Pillai, *A Feminist Rewriting of Air India v Nergesh Meerza AIR 1981 SC 1829: Proposal for a Test of Discrimination Under Article 15(1)*, 5(3) Indian L. Rev. 338 (2021).

⁹⁵ *Id.*

was scrapped on account of being arbitrary, and the condition relating to the first pregnancy was changed to the third pregnancy. The line of reasoning provided by the court was that the pregnancy-related condition would discourage air hostesses from having their first child. On the other hand, discouraging air hostesses from having a third child would be beneficial for the State in terms of controlling population growth.⁹⁶ Lastly, the marriage condition was held valid and non-arbitrary. This case is regarded as one of the gravest failures of the Supreme Court of India in taking a step towards eliminating gender-based discrimination in the formal sector.⁹⁷

Other landmark cases. Under the purview of this section, it is also essential to look at and elucidate the recent cases that have enshrined protection and curtailed discrimination towards women in multiple sectors. A fine example of the Supreme Court liberalizing the workspace was demonstrated by its decision in February 2020 to allow permanent commission to women officers in the Indian Army who were previously excluded on the grounds of fitness.⁹⁸ This clearly implies that jurisprudence is becoming increasingly aware of the imbalance arising out of arbitrariness and previously accepted and misplaced rationales for keeping women out of an increasingly male-dominated profession. Additionally, case law is setting precedent on the issue of maternity leaves for women employed in the government sector. *Municipal Corporation of Delhi v. Female Workers (Muster Roll)*⁹⁹ also brings the scenario to the informal sector. In order to uphold Articles 39 and 42, female workers (muster roll) employed by the Municipal Corporation of Delhi were granted the same maternity leave, as granted to regular female employees, both before and after childbirth.¹⁰⁰ Yet, in other cases, the gender pay gap has become increasingly important as a litmus test for true equality. *Mackinnon Mackenzie & Co. Ltd. v. Audrey D'Costa and Another*¹⁰¹ set a precedent for equal pay for women employed in the same post as men.¹⁰² Furthermore, the landmark judgment in *CB Muthamma v. Union of India and Others*¹⁰³ put an end to the longstanding

⁹⁶ Atrey & Pillai 2021.

⁹⁷ *Id.*

⁹⁸ "Absolute Exclusion of Women from Command Appointments in Army Illegal": SC Dismisses Centre's Appeals Against Delhi HC Verdict, Live Law, 17 February 2020 (Mar. 30, 2022), available at <https://www.livelaw.in/top-stories/absolute-exclusion-of-women-from-command-appointments-in-army-illegal-sc-152811>.

⁹⁹ *Municipal Corporation of Delhi v. Female Workers (Muster Roll)*, 2000 (2) S.C.R. 171 (Mar. 30, 2022), also available at <https://indiankanoon.org/doc/808569/>.

¹⁰⁰ *Id.*

¹⁰¹ *Mackinnon Mackenzie & Co. Ltd. v. Audrey D'Costa and Another*, 1987 A.I.R. 1281 (Mar. 30, 2022), also available at <https://main.sci.gov.in/jonew/judis/8771.pdf>.

¹⁰² *Id.*

¹⁰³ *CB Muthamma v. Union of India and Others*, A.I.R. 1981 S.C. 1829 (Mar. 30, 2022), also available at <https://main.sci.gov.in/jonew/judis/4724.pdf>.

discrimination against women in the public sector, wherein the petitioner was denied promotions and was asked to submit a letter stating that she would resign if she were to get married. The Supreme Court ruled down this condition because these practices should apply to men as well.¹⁰⁴ To that extent, the role of jurisprudence in setting precedents in matters of gender equality in the workplace should be duly acknowledged as a reinforcement of liberal reform.

Since the ILO's inception in 1919, "Gender Equality at Work" has been one of its fundamental principles. Closing the gender gap is the ultimate goal. Women have become more educated, are working double shifts, and are also joining trade unions, sometimes to the same extent as men. It is a matter of grave concern that, despite the efforts of international organizations and governments, over time, the gender gap in employment has become institutionalized. There is, therefore, a definite need for policy-level interventions complemented by changes in socio-cultural factors as well.

Furthermore, concrete and innovative policy interventions are required to enable women to overcome gendered barriers in the labor market. Primarily, despite the existence of legislation on paper, there is a need to strengthen the enforcement of equal opportunity and equal pay in the workplace. Moreover, the government should improve the monitoring mechanism to keep a close check on the discriminatory practices and intervene proactively rather than reactively. It is also critical that governments strengthen the compliance mechanism for equal employment and wage opportunities, since it is illegal for any organization to pay men more than women for the same job under statutory acts. The scope of such acts should be expanded to cover all levels of employment. Currently, the reporting mechanism for discriminatory practices in the workplace is difficult and tedious. A simple and fair reporting mechanism for unjust treatment in the labor market needs to be created. Last but not the least, the government should raise public awareness about its programs and initiatives in the area of women's empowerment. Thus, this will lead to a wider acceptance of such programs and increased women's participation in the labor market.

2.4. Chinese Law and Case-Law on Discrimination

The Chinese government has always attached great importance to the protection of women's rights and interests. In the process of establishing the socialist rule of law in China, the Chinese government has continuously explored and innovated labor rights protection mechanisms as well as mechanisms with Chinese characteristics for the protection of women's rights and interests. In terms of preventing gender discrimination in employment, China has developed a legal framework for anti-sex discrimination in employment on the basis of the constitution. The main bodies of this framework are the labor standards law, the social security law and the women's

¹⁰⁴ *CB Muthamma v. Union of India and Others*, *supra* note 103.

rights protection law. This framework also includes a number of other relevant separate laws and regulations of the country and of China's Hong Kong, Macao and Taiwan regions, as well as a variety of local and government regulations in mainland China.

The Constitution of the People's Republic of China stipulates the general principle of equality and the principle of equality between men and women as constitutional norms against gender discrimination in employment. The laws that convert the gender equality principle of the Constitution into legal rights include: the Law of the People's Republic of China on the Protection of Rights and Interests of Women (under Article 22, the state guarantees that women enjoy equal labor rights and social security rights with men); Labor Law of the People's Republic of China (Arts. 3, 12, 13, 29, 46, etc.), Law of the People's Republic of China on Employment Contracts (Art. 3), Law of the People's Republic of China on Employment Promotion (Arts. 3, 26, 27, 62, 68, etc.); the Labor Standard Law, the Gender Work Equality Law, the Labor Contract Law, etc. in Chinese Taipei; the Sex Discrimination Ordinance and Employment Ordinance etc. in Hong Kong, China. The special protection for female employees is mainly provided in the Social Insurance Law of the People's Republic of China, the Special Provisions on Labor Protection for Female Employees, the Law of the People's Republic of China on Population and Family Planning, the Civil Code of the People's Republic of China, the Measures for the Implementation of Suspension of Employment for Parenting in Taiwan, the Sexual Harassment Prevention law among others.

In addition, the Notice on Further Regulating Recruitment Behavior to Promote Women's Employment clarified the issue of gender discrimination in employment in the recruitment process and proposed the "six no" and more detailed penalties. According to this document, in the process of drafting recruitment plans, publishing information, and recruiting, enterprises must not limit gender or gender priority, must not use gender to restrict women's job search and employment, must not inquire about women's marriage and childbirth, must not use pregnancy tests as entry medical examination items, must not use restriction of childbirth as a condition for recruitment and must not differentiate in any way that would raise the recruitment standards for women. Employers who refuse to correct the job posting information on gender discrimination will be fined between 10,000 CNY (not less than) and 50,000 CNY (not more than), and if the circumstances are serious, the service permit will be revoked. The employers who have been punished will also be included in the "blacklist" for untrustworthy punishment.

In 2021, the Ministry of Human Resources and Social Security, issued by the Management Regulations of Online Recruitment Service clarified this once again.

Following the establishment of China's socialist market economy system, the original employment system of the planned economy, which consisted of unified distribution and lifetime employment, was replaced by a system of labor allocation based on market forces. This transformation has also resulted in the use of labor

entities to have choices of preference when hiring laborers, which are often based on pragmatic choices. According to a statistical report in the 1990s, women accounted for 38% of the total labor force in China in 1996, whereas the proportion of women laid off during the same period accounted for 59.2%.¹⁰⁵ This data show that during the reform of the labor market, due to the lack of a specific legal mechanism for equal employment protection for women, employers tended to prefer to retain male employees based on their employment autonomy, and this tendency still persists. In 2018, the proportion of female employees reached 43.7%,¹⁰⁶ but it has not yet reached a relative balance and gender discrimination still exists. One of the root causes of this phenomenon is due to a female's physiological factors and the burden of family obligations. Moreover, China's Special Rules on the Labor Protection of Female Employees provide strict regulations on the rights and interests of female employees, such as occupational taboos, maternity leave limits and four-term protection of female employees (during menstruation, pregnancy, childbirth and lactation periods). These strict regulations are taken into account by employers when selecting female employees and they are an important factor for calculating female labor costs. At present, due to the worsening of population aging, the revised Law of the People's Republic of China on Population and Family Planning (2021) encourages one family to have two children. Based on the policies of late marriage and late childbirth in various regions, women need at least 6–8 months to have two children and cannot engage in work. Similar to Gary S. Becker's theory of preference discrimination, the cost of childbirth is the primary reason employers reject female applicants.

Turning to the analysis of the Chinese case laws, we will now look at certain examples of gender discrimination cases considered in mainland China recently. Using "gender discrimination" as the key word in a full-text search on pkulaw.com, a total of 439 cases were found. However, there were only seventeen civil cases and two administrative cases on gender discrimination in employment in 2017–2019, and the remaining cases involved marriage, family, inheritance, personality rights disputes and so on. When conducting a search on the cause of action for 'gender discrimination', there are only two articles on the entire website. Compared to the large number of judgment documents in labor dispute litigation, the cases involving "gender discrimination in employment" are close to zero. The majority of these seventeen cases took place in Shandong Province, Guangdong Province and Beijing. The mentioned data reflects the lack of legislation on the specific cause of action in cases of gender discrimination in employment in China.

¹⁰⁵ See Statistical Bulletin of Labor Development 1996, 3 Journal of Labor Protection and Technology (1997).

¹⁰⁶ See Statistics Division of Social Science and Technology and Cultural Industries of the National Bureau of Statistics of the People's Republic of China, Women and Men in China – Facts and Figures (2019) (Mar. 30, 2022), available at <https://bbs.pku.edu.cn/attachl/63/6e/636e4ad11325ae70/>.

During the same time period, a total of 213 cases of labor disputes and personnel disputes were found by using the keywords “termination of labor contract” and “pregnancy.” In these cases, the employers discriminated against women before and after pregnancy through “salary reduction and post transfer,” “refusal to return to the old post,” “suspension of wages,” “suspension of social security payment,” and “illegal termination of labor contracts” among other practices. In these instances, the demands of the majority of female employees have been met. However, it still shows that some employers are trying to touch (or surpass) the bottom line of the law.

Regardless of whether it is a labor dispute arbitration procedure or a direct entry into the litigation procedure, in many cases, there is first a need to confirm a labor relationship between the employer and the employee. Therefore, gender discrimination during the recruitment stage is excluded from labor dispute cases. For example, in *Cao Ju v. Giant Education Group Case*, *Guo X v. Hangzhou X Cooking Vocational Skills Training School Case*, *Deng XX Application for General Personality Dispute Appeal Application Case* and other cases, although the essence of the cases involves gender discrimination at the recruitment stage, all of the litigations were filed on the grounds of action that the defendant infringed the plaintiff’s personal rights, which constituted cases of personal rights disputes. The Notice by the Supreme People’s Court about Adding Causes of Action in Civil Cases ([CLI Code] CLI.3.328707) has added “disputes on equal employment rights” as a fourth-level cause of action under “general personal rights disputes.” However, this does not change the situation as the relevant labor laws cannot be applied to gender discrimination during the recruitment process. For example, in the *Guo X* case, *Guo X* was eventually awarded 4,000 RMB in compensation for emotional distress because his employer violated his personal rights.

The People’s Republic of China’s Circular Economy Promotion Law provides for four types of discrimination, but the discrimination against women in marriage and childbirth is not clear. The Law of the People’s Republic of China on the Protection of Women’s Rights and Interests stipulates that labor contracts must not contain content that restricts the marriage and childbirth of female employees, but it does not prohibit employers from knowing the status of female employees’ marriage and childbirth. The notice on Further Regulating Recruitment Activities to Promote Equal Employment for Women requires employers not “to ask women about their marriage and childbirth” during the recruitment process. However, marriage and childbirth discrimination exist not only at the recruitment stage but also at every stage of the employer’s entire employment process. Employers may implement discriminatory behaviors in more subtle ways. Once a dispute occurs, the lawsuit filed by the discriminated female employee is often not for the realization of equal employment rights but for the maintenance of other labor rights.

In the existing seventeen cases, 35% of the judgments failed to support the discriminated employees’ requests due to a lack of evidence. Thus, in *Liu XX v. X Supermarket Co., Ltd. Labor Dispute Case* and *Wang XX v. X Shandong Investment Development Co., Ltd.*, the plaintiff (i.e. employers) lost due to insufficient evidence.

In these circumstances, the judges often analyze the corresponding evidence for the specific demands of the workers, rather than first analyzing the employer's subjective intentions and the unreasonableness of differential treatment from the perspective of discrimination. China's labor legislation does not specify the criteria for judging gender discrimination in employment, particularly how to determine the causal relationship between the gender discrimination and the differential treatment. It is difficult for employees to obtain comprehensive evidence of employers' discriminatory behavior, especially of the employer's subjective intentions. In addition, because labor dispute cases follow standard civil litigation procedures, the parties adhere to the general principle of proof distribution: "whoever advocates – presents evidence." It is evident from the cases that even though the inversion of the burden of proof is stipulated in the Labor Dispute Mediation and Arbitration Law of the People's Republic of China, the employers will only provide evidence that is beneficial to them. As a result, the employees who are discriminated against in such cases must bear an excessive burden of proof.

To sum up, in order to eliminate gender discrimination in employment and promote the realization of women's equal employment rights, China should improve the legal framework for anti-discrimination in employment in the following aspects: (a) giving full play to the guidance of public opinion and social advocacy under the leadership of the government in order to instill the concept of fair employment deeply rooted in the hearts of the people; (b) reducing employers' labor costs by providing appropriate preferential treatment to employers who hire female employees by means of tax incentives or refund policies; (c) establishing a public-private administrative mechanism¹⁰⁷ for achieving equal employment rights through administrative intervention, including adding gender discrimination in employment as a subject of supervision in the "Regulation on Labor Security Supervision" and stipulating the law enforcement powers of the labor security administrative agencies; (d) applying the "Labor Dispute Mediation and Arbitration Law of the People's Republic of China" to cases involving gender discrimination in employment in the scope of labor disputes; (e) incorporating operability provisions into existing relevant laws, such as imposing certain administrative penalties on employers who have a past record of gender-based discrimination in the workplace, while also, including them in the social untrustworthiness evaluation system; (f) clearly defining "employment discrimination" in the existing legislation, conducting a reasonable review of the reasons for employers' general differential treatment, and examining the appropriateness, necessity and proportionality of the differential treatment; (g) expanding the scope of the inversion of the burden of proof in the existing labor arbitration to employment discrimination, as well as improving the existing paternity leave system and establishing the length of paternity leave at the national level, in order to balance the labor costs of male

¹⁰⁷ See Xianyong Wang, *Administrative Enforcement Mechanism in China's Employment Discrimination Law*, 2 Sci. L. 153 (2021).

and female employees; (h) restricting employers' rights to obtain marriage and childbirth information of job applicants as part of the scope of personal privacy and information protection.¹⁰⁸ In addition, the establishment of childcare facilities on employers' premises should also be promoted.

2.5. The Laws of South Africa on Gender Discrimination and the Relevant Jurisprudence

The awareness of the existence of discrimination and protection against it can take place at various levels. At a societal level, various educational and awareness programmes can be implemented to bring light to gender stereotypes and the effects of discrimination (such as prohibitive norms, harassment and violence). However, change at the societal level takes time and so, in the interim, what is required is mandated national legislation aimed at equalizing the playing field and empowering women and other minorities to take their seats at the table, and be fully protected in doing so. The concept "gender mainstreaming" was extensively used during the Beijing Conference on Women in 1995 and in the past few years has been embraced in many policy documents, including national strategy plans on the Beijing Platform for Action and within the South African context.¹⁰⁹ Gender mainstreaming is concerned with both the inclusion of women as active participants in existing systems and changes to the existing systems to reduce gender inequalities stemming from women's disadvantaged positions in societies.¹¹⁰

The Women's Charter for Effective Equality was introduced in 1994 in South Africa and outlines the vision and desires relating to human rights, dignity and the desire for better material conditions of South African women.¹¹¹

South Africa provides for the following legislation for the protection and advancement of women and other minorities, particularly in regards to equality, discrimination and harassment:

1. The South African Constitution promotes the achievement of equality between men and women,¹¹² whilst the Bill of Rights¹¹³ promotes the achievement of equality with equality speaking to the equal enjoyment of rights and freedoms by all persons.

¹⁰⁸ See Tang Fang, *Judicial Practice and System Improvement on Discrimination Against Marriage and Child-birth in Recruitment*, 31(1) J. China Women's U. 41 (2019).

¹⁰⁹ Nasima M.H. Carrim, "Who Am I?" – *South African Indian Women Managers' Struggle for Identity: Escaping the Ubiquitous Cage*, PhD dissertation, University of Pretoria (2012).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Constitution of the Republic of South Africa (No. 108 of 1996) (Mar. 30, 2022), available at <http://housingfinanceafrica.org/app/uploads/Constitution-of-the-Republic-of-South-Africa-Act-108-of-1996.pdf>.

¹¹³ Bill of Rights, Chapter 2, Constitution of the Republic of South Africa.

2. The Employment Equity Act protects women from unfair discrimination and defines women as a part of a “designated group” subject to affirmative action practices in order to achieve employment equity.¹¹⁴

3. The Promotion of Equality and Prevention of Unfair Discrimination Act oversees the prohibition of unfair discrimination, harassment and hate speech.¹¹⁵

4. The Protection from Harassment Act provides for protection against harassment, which includes that of a sexual nature, bullying or stalking.¹¹⁶

Across the world, women are systematically underrepresented in every sector of the labor market, but this is especially true in top management, academia, science and technology, and engineering.¹¹⁷ Gender stereotypes impede the ability of women and other stereotyped groups from enjoying equal opportunity in the workplace, as well as contributing to and perpetuating more overt forms of discrimination. Gender stereotyping could thus be considered a human rights violation.¹¹⁸ The prevailing underrepresentation of women in high-level positions is still largely due to the stereotypes that continue to exist and perpetuate in the workplace. As a result of these stereotypes, women and their performance at work are often judged far more negatively when compared to their male counterparts. Within South Africa as well, stereotypes continue to have a detrimental effect on women.

For over 400 years, white males have discriminated against women and the broader black community (including Black, Indian, Colored or Mixed heritage) in South Africa. However, it was during apartheid (which was formally instituted in 1948) that discrimination was legally indoctrinated into the country.¹¹⁹ In addition, it appears that this extends across cultures and origins. In certain places, for example, customary law permits the dominance of women and the limiting of their rights in the name of maintaining traditional power structures.¹²⁰ These persistent stereotypes often legitimize domestic violence.¹²¹

¹¹⁴ Employment Equity Act (No. 55 of 1998) (Mar. 30, 2022), available at <https://www.labour.gov.za/DocumentCenter/Acts/Employment%20Equity/Act%20-%20Employment%20Equity%201998.pdf>.

¹¹⁵ Promotion of Equality and Prevention of Unfair Discrimination Act (No. 4 of 2000) (Mar. 30, 2022), available at <https://www.justice.gov.za/legislation/acts/2000-004.pdf>.

¹¹⁶ Protection from Harassment Act (No. 17 of 2011) (Mar. 30, 2022), available at https://www.gov.za/sites/default/files/gcis_document/201409/a172011.pdf.

¹¹⁷ Cristian Berrío-Zapata et al., *Gender Digital Divide in Latin America: Looking for a Helping Hand in the BRICS*, Digital Icons (2018) (Mar. 30, 2022), available at https://www.digitalicons.org/wp-content/uploads/2019/02/DI19_8_Zapata_et_al.pdf.

¹¹⁸ Danielle Visser, *Parental Leave in South Africa: Bridging the Gap Between Gender Roles and the Right to Equality*, University of Pretoria (October 2018) (Mar. 30, 2022), available at https://repository.up.ac.za/bitstream/handle/2263/70041/Visser_Parental_2018.pdf?sequence=1.

¹¹⁹ Carrim 2012.

¹²⁰ Catherine Albertyn, “*The Stubborn Persistence of Patriarchy?*” *Gender Equality and Cultural Diversity in South Africa*, 2(1) Const. Court Rev. 165 (2009).

¹²¹ Committee on the Elimination of Discrimination against Women, Inquiry concerning South Africa conducted under Article 8 of the Optional Protocol to the Convention, CEDAW/C/ZAF/FIR/1, 15 June

Despite having reached a democratic state over twenty-five years ago, attitudes and beliefs of inferiority toward women unfortunately continue to linger, perhaps in more discrete forms, but dangerous and damaging to career advancement nonetheless. Women are inherently perceived as belonging in the home, not the workplace.¹²² These characteristics, according to both black and white men in a South African study, do not endear women as being capable of successfully holding managerial positions.¹²³ Instead, such positions are deemed reserved for those who are considered dominant, assertive and decisive, that being, the “typical” male profile. Given these findings are congruent across studies in other countries as well, it is possible to assume that such stereotypes and the definition of typical gender roles are indeed pan-cultural.¹²⁴

The advancement of human rights relies on achieving gender equality, and yet discriminatory laws against women continue to exist across the world, with laws being enforced that do no justice to half of the population. Legal traditions continue to see women and girls as being classed as second-class citizens with regard to nationality and citizenship; health; education; marital rights; parental rights; property rights, and more pertinently to the topic of this article, employment rights.¹²⁵

Article 1 of CEDAW provides a definition of discrimination against women on the basis of gender:

For the purposes of the present Convention, the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment and exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

When reviewing South African case law regarding gender discrimination in the workplace, taking this definition into account allows room for further exploration of the jurisprudence and the protection, advancement and empowerment of women.

2022 (Mar. 30, 2022), available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolNo=CEDAW%2fC%2fZAF%2fFIR%2f1&Lang=en.

¹²² Visser, *supra* note 118.

¹²³ Lize A.E. Booysen & Stella M. Nkomo, *Gender Role Stereotypes and Requisite Management Characteristics: The Case of South Africa*, 25(4) *Gend. Mgmt.: Int’l J.* 285 (2010) (Mar. 30, 2022), also available at https://repository.up.ac.za/bitstream/handle/2263/15914/Booyesen_Gender%282010%29.pdf?sequence=1&isAllowed=y.

¹²⁴ Romie F. Littrell & Stella M. Nkomo, *Gender and Race Differences in Leader Behaviour Preferences in South Africa*, 20(8) *Women Mgmt. Rev.* 562 (2005).

¹²⁵ Office of the U.N. High Commissioner for Human Rights, *Combatting Discrimination Against Women* (2021).

Although South Africa has a robust and often revered legislative framework for gender equality, meaningful progress toward the application of such jurisprudence remains stymied. In addition to the already existing legislation discussed above, in an attempt to address inequality and discrimination, the South African government launched the National Gender Policy for Women's Empowerment,¹²⁶ approximately twenty years ago, on the promise of developing and uplifting gender transformation. However, despite the hope that it would empower women, it left much to be desired. It is not surprising then, that it was never officially published or promulgated because it was developed without consulting women at a grassroots level, contested by a lack of specific and measurable targets and associated plans for action and contained no inclusion of political responsibility on the subject.¹²⁷ Unfortunately, this is just one such example of a slew of failing or slow-to-progress measures or policies.

Despite South Africa's highly regarded legislative mechanisms and reforms, they are often insufficiently robust enough to ensure meaningful compliance, and are limited in application within the private domain, where prejudices and "traditional gender-roles" are incubated and acquire their potent influence within the public domain.¹²⁸ An instance of the pervading influence of such prejudices is seen in the matter of *Pillay v. The South African Post Office and Others*,¹²⁹ in which the perpetrator of workplace sexual harassment claimed ignorance of legislative mandates in this regard. Indeed, South Africa faces various socio-economic and cultural challenges that contribute to gender inequality, including the particular challenge of promoting an equitable, non-gender-focused division of labor and expanding equitable access to work opportunities for women.¹³⁰ Within the workplace itself, South African women are frequently marginalized in terms of recruitment, selection, promotion and career management processes.¹³¹ This is perhaps best evidenced by the fact that despite the fact that South Africa has 40% female representation in parliament, there are no

¹²⁶ Office on the Status of Women, South Africa's National Policy Framework for Women's Empowerment and Gender Equality (2000) (Mar. 30, 2022), available at https://www.dffe.gov.za/sites/default/files/docs/national_policy_framework.pdf.

¹²⁷ Nasima M.H. Carrim, *Sandwiched Between Groups: Upward Career Experiences of South African Indian Women*, 52(1) S. Afr. J. Bus. Mgmt. (2021).

¹²⁸ Public Service Association, *Women and the Workplace: Challenges of Diversity and Women Progression* (2019) (Mar. 30, 2022), available at https://www.psa.co.za/docs/default-source/psa-documents/psa-opinion/women-and-the-workplace--challenges-of-diversity-and-women-progression.pdf?sfvrsn=18797042_1.

¹²⁹ *Pillay v. The South African Post Office and Others* (D 407/10) [2012] Z.A.L.C.D. 21.

¹³⁰ Shikha Vyas-Doorgapersad, *Designing Measurement Instruments for Sustainable Development Goals One, Five and Nine: A Gendered Perspective in South Africa*, 10(3) Afr. J. Public Aff. 118 (2018).

¹³¹ Ayola Bangani & Shikha Vyas-Doorgapersad, *The Implementation of Gender Equality Within the South African Public Service (1994–2019)*, 8(1) Africa's Public Service Delivery and Performance Rev. (2020).

clear succession programmes in place to support these women, and the majority of positions in local and provincial government remain predominantly male.¹³²

Addressing gender discrimination should not be seen as an elective, and the South African government should, in review of the information contained above, ensure that action is taken as a result. Millions of people around the world are denied access to decent work, and those who do have employment opportunities are often restricted to low-paying occupations in specific industries. This could be due to their disability, ethnicity, gender, sexual orientation or other status deemed inadequate. Women and minorities have faced the brunt of this discrimination for hundreds of years. These vulnerable groups are confronted with the full force of oppression: they are exploited, marginalised, left powerless and subject to systematic abuse in their search for work. Discrimination deprives people of their dignity, voice and ability to fully participate. It prevents access to meaningful opportunities, perpetuates stereotypes against men and women, worsens socio-economic tensions and lays the groundwork for further exclusion and poverty.

Conclusion

BRICS has proven to be an effective association with regard to trade and development. However, gender and gender equality have played a minuscule role. Of the five countries, South Africa has perhaps made the most notable contribution to the inclusion of women in the workplace¹³³ but there is most certainly room for improvement. The authors propose the following suggestions as a way to move forward with gender equality in employment and which are applicable to all of the BRICS countries:

1. Combatting gender stereotypes that restrict women to certain spheres of employment (generally lower-paying) and fix the main role of women in carrying out domestic and family work.

2. Gender discrimination within employment has to be effectively mapped out and researched further. The phenomenon of discrimination is a combination of multiple factors, such as lack of access to education for women; gendered perceptions and stereotyping of women; as well as the separation of issues within the home (which inherently have an effect on the work performed by women), all of which contribute to the marginalisation of women at work.¹³⁴

3. Women have a unique opportunity to organize within the workplace and focus on the shared experiences of discrimination. Women experience common barriers based on cultural relativism and are thus able to create a valuable network

¹³² Public Service Association, *supra* note 128.

¹³³ World Economic Forum, Global Gender Gap Report 2020 (2019) (Mar. 30, 2022), available at https://www3.weforum.org/docs/WEF_GGGR_2020.pdf.

¹³⁴ Berrío-Zapata et al., *supra* note 117.

of solidarity that can be leveraged to combat these invisible barriers and challenges to their equality and advancement.¹³⁵

4. Lastly, when legislation and its implementation thereof are lacking, in conjunction with its BRICS partners, the member countries strive to make valuable use of their shared platform in creating more equitable nations. This could be achieved by looking at the legislation itself and dismantling the often-prohibitive provisions contained within.¹³⁶ The issues of the gender pay gap and sexual harassment at work may be highlighted as key issues to be addressed in BRICS.

There is already some movement towards supporting the BRICS activities that are aimed at gender equality. In 2021, Dr Victoria V. Panova, who is the Managing Director of the Russian National Committee on BRICS Research, emphasized the need for a BRICS Collective Commitment to “Women’s Economic Empowerment.”¹³⁷ At the BRICS summit, the toolkit “Women Economic Empowerment in BRICS: Policies, Achievements, Challenges and Solutions” was presented. It presents an analysis of the policies, current trends, barriers, common challenges and opportunities for women’s economic empowerment in the BRICS countries, as well as highlights best practices.¹³⁸ The BRICS countries could learn from one another, focusing in particular on South Africa’s successful experience.

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¹³⁵ Berrío-Zapata et al., *supra* note 117.

¹³⁶ Visser, *supra* note 118.

¹³⁷ BRICS Dialogue on the future of work: Towards a women-led growth framework – June 2, 2021, Observer Research Foundation, 16 June 2021 (Mar. 30, 2022), available at <https://www.orfonline.org/research/brics-dialogue-on-the-future-of-work-towards-a-women-led-growth-framework-june-2-2021/>.

¹³⁸ Russian National Committee on BRICS Research, *supra* note 13.

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