



**COMMENTS OF THE
INTERNATIONAL LABOUR OFFICE**

**FOR THE GENERAL DISCUSSION ON
THE PROPOSED GENERAL RECOMMENDATION ON
ACCESS TO JUSTICE
BY THE COMMITTEE ON THE ELIMINATION OF
DISCRIMINATION AGAINST WOMEN**

Geneva, February 2013

1. Introduction: ILO instruments relevant to discrimination against women and the Committee of Experts' comments on access to justice

The General Recommendation No. 28 refers to the ILO Conventions on equality, namely, the Equal Remuneration Convention, 1951 (No. 100); the Discrimination (Employment and Occupation) Convention, 1958 (No. 111); and the Workers with Family Responsibilities Convention, 1981 (No. 156), as contributing to an international legal regime of equality for women with men and non-discrimination (paragraph 3)). With respect to the access of women to justice, other ILO Conventions, such as the Labour Inspection Convention, 1947 (No. 81), the Migration for Employment Convention (Revised), 1949 (No. 97), the Labour Inspection (Agriculture) Convention, 1969 (No. 129), the Indigenous and Tribal Peoples Convention, 1989 (No. 169), and the Domestic Workers Convention, 2011 (No. 189), are also relevant.

The application of ratified ILO Conventions is supervised by the ILO Committee of Experts on the Application of Conventions and Recommendations (hereafter the Committee of Experts), a body of independent experts from various legal systems and geographical regions, which meets annually. Each year, the Committee of Experts publishes a General Survey on national law and practice from ILO member States on a specific topic.¹ When examining the States' regular reports on the application of ratified ILO Conventions, the Committee of Experts has continuously addressed the issue of access to justice.

The Committee of Experts has considered it critical to have adequately resourced and responsive procedures and institutions, which are accessible to all groups, and has underlined that a number of countries have acknowledged the need to strengthen monitoring and enforcement mechanisms, including the labour inspectorate, specialized equality or equal pay bodies and the courts, in order to better address non-discrimination and equality in employment and occupation.² It regularly invites member States to raise awareness of the relevant legislation, to enhance the capacity of the competent authorities, including judges, labour inspectors and other public officials, to identify and address cases of discrimination and unequal pay, and also to examine whether the applicable substantive and procedural provisions, in practice, allow claims to be brought successfully.³

¹ The issue of access to justice is covered for example in the following General Surveys: General Survey on labour inspection, ILO, 2006; General Survey on eradication of forced labour, ILO, 2007; and General Survey on social security and the rule of law, ILO, 2011; *Giving globalization a human face* (General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008), ILO, 2012.

² General Survey on fundamental Conventions, ILO, 2012, paragraph 868.

³ *Ibid.*, paragraph 871.

The role of labour inspection in the area of non-discrimination and specialized equality and equal pay bodies is a particular focus of this note, since other relevant issues concerning access to justice have already been covered by the CEDAW Concept Note.

2. The notion of “justice” and “justice systems” to be covered by the proposed General Recommendation

The CEDAW Committee has pointed out that at the initial phase of the judicial chain, access to justice can be hindered by weakness in the operations of the police, prosecutors and entities first encountered by those seeking justice (Concept Note, chapter IV, paragraph A-2).

Labour inspection services

In the world of work, where provisions on non-discrimination, equality and equal remuneration are set out in labour laws, the supervision of the relevant provisions often rests in the first instance with the labour inspection services.⁴ Their role normally includes detecting and addressing violations during inspection visits, reporting such violations and imposing sanctions, as well as dealing with complaints submitted by workers.

Labour inspection has been one of the priorities of the ILO since its beginnings, as seen in the Treaty of Versailles and the ILO Constitution.⁵ The Labour Inspection Convention (No. 81) and the Labour Inspection (Agriculture) Convention (No. 129) were adopted respectively in 1947 and 1969.

Specialized equality and equal pay bodies

The Committee of Experts has recently observed the growing number of specialized equality and equal pay bodies established at the national level and their increasing role in the resolution of disputes, including with respect to employment and occupation. The development of such bodies plays an important role in improving the access of women to justice and enabling them to exercise their rights and obtain redress. The Committee of Experts has also pointed out that complaints dealing with employment and occupation often represent a significant proportion of the work of specialized equality bodies. Many specialized bodies have a specific function in the dispute resolution process but most of the time their functions go beyond. They have a diversity of mandates, in terms of the scope of their activities – from

⁴ General Survey on fundamental Conventions, ILO, 2012, paragraph 872.

⁵ Article 427, ninth point of Part XIII of the Treaty of Versailles, and Article 10(2)(b) of the ILO Constitution.

promotional/advisory to investigatory/decision-making – and in terms of the subjects they can address.⁶

In Norway, for example, the Equality and Anti-Discrimination Ombud and the Equality and Anti-Discrimination Tribunal have the authority to make recommendations and give rulings with respect to decisions by, or general practices of, governmental and state institutions, including regarding laws that might contravene equality and anti-discrimination legislation. The Ombud has the competence to investigate alleged non-compliance with the law and make recommendations, which can be appealed before the Tribunal.⁷ In Malta, the National Commission for the Promotion of Equality recommended the adoption by the Government of specific measures “seeking to establish a system of job evaluation”. In Sweden, the recently established Office of the Equality Ombudsman has responsibility for supervising pay surveys, which are required under the Discrimination Act, to determine if there are unjustified wage differentials.⁸ In France, the Defender of Rights, which includes a specific branch dealing with discrimination and equality issues, is entitled to provide the courts with written or oral observations in order to support a case.

The importance of coordination and collaboration between specialized equality bodies and labour inspectorates has been regularly stressed by the Committee of Experts and progress has been recently observed in this regard in a number of countries (for example in Belgium, France and Spain).⁹

ILO mechanisms

The ILO has put in place several mechanisms for the protection and enforcement of labour rights, including to non-discrimination and equality. Pursuant to article 23, paragraph 2 of the ILO Constitution, copies of all reports of the States on the application of ratified Conventions should be communicated to employers’ and workers’ organizations. These organizations may provide observations on the application of the Conventions by the States, which will be examined by the Committee of Experts with the report of the State.

In addition, under article 24 of the ILO Constitution, employers’ and workers’ organizations may file a representation to the Office concerning non-observance by the States of ratified Conventions. Under article 26 of the ILO Constitution, a complaint may be filed against a member State for non-observance of a ratified Convention by another member State which has ratified the same Convention; the same procedure may be initiated on receipt of a complaint filed by a delegate (Worker,

⁶ General Survey on fundamental Conventions, ILO, 2012, paragraph 877.

⁷ *Ibid.*, paragraph 879.

⁸ *Ibid.*, paragraph 880.

⁹ *Ibid.*, paragraph 882.

Employer or Government) to the International Labour Conference, or by the Governing Body in its own initiative.

These ILO mechanisms have a significant impact on ensuring access to justice, in the context of monitoring the effective implementation of the ILO Conventions on equality. In addition, the Office regularly provides training for judges on gender equality.¹⁰ The recognition and respect of the international mechanisms, and of the role of the international organizations, including with respect to awareness raising and training activities, is essential in ensuring access to justice at the international level.

3. Institutional obstacles

Access to justice requires an institutional guarantee, including adequate resources (both in terms of human and financial/material), and adequately trained officials who are in charge of the administration of justice.

The Committee of Experts has observed that many States continue to face difficulties in establishing and maintaining adequate labour inspection services to carry out their monitoring duties. The lack of human and material resources has an impact on the capacity of labour inspectors to address discrimination and equal remuneration issues.¹¹

The need to have adequately resourced institutions and adequately trained officials also applies to the specialized equality and equal pay bodies, given their increased roles in the administration of justice noted above.

Financial/material resources

The issue of lack of financial/material resources should not be underestimated. For example, the duties of a labour inspector require mobility. In some countries, a major obstacle preventing labour inspectors from carrying out their tasks is the inadequacy or even the absence of transportation. Lack of appropriate offices for labour inspectors is also a concern.¹²

In addition, ensuring physical accessibility of complainants, in particular rural women, to the courts, including labour tribunals, the labour inspectorate and the equality bodies requires the existence of close-by offices and a geographical distribution of such offices.

¹⁰ For example, in October 2012, the GENDER Bureau of the ILO, in partnership with the International Training Centre of the ILO, held a workshop for professional upgrading of 26 judges from courts in Botswana, Malawi, Nigeria, South Africa and Zambia, on the application of the ILO Conventions on equality.

¹¹ General Survey on fundamental Conventions, ILO, 2012, paragraph 874.

¹² General Survey on labour inspection, ILO, 2006, paragraphs 244, 249 and 252.

Human resources: composition, competencies, stability and independence

The effectiveness of labour inspection largely depends on the commitment of the public authorities to the effective implementation of measures to attract and retain a sufficient number of qualified and motivated staff.

With regard to the gender consideration, the provision of the Treaty of Versailles regarding the organization of a labour inspectorate stipulates that the inspectorate should include women. Pursuant to article 8 of Convention No. 81 and article 10 of Convention No. 129, “both men and women” must be eligible for appointment to the inspection staff. In its comments, the Committee of Experts has expressed the hope that more steps would be taken to encourage the recruitment, training and promotion of women inspectors and to ensure that there is greater gender awareness throughout the inspection system.¹³

Labour inspectors’ employment must be governed by conditions of service and a status which ensure the stability they need to perform their duties in accordance with the legislation regarding their powers and responsibilities and without any improper external influence.¹⁴ Impartiality, integrity and discretion are essential qualities of a labour inspector. It is vital that levels of remuneration and career prospects of inspectors be such that high-quality staff are attracted, retained, and protected from any improper influence.¹⁵ In addition, imposing a duty of confidentiality on labour inspectors is a prerequisite for the effectiveness of labour inspection.¹⁶

Human resources: training

In order for the administration of justice to be free from gender bias and negative stereotypes, adequate gender sensitive trainings should be provided to judges and law enforcement officials, including labour inspectors. Article 7(3) of Convention No. 81 and article 9(3) of Convention No. 129 address this issue. Noting that in a number of countries certain measures had been taken to assist judges and labour inspectors to fulfil their role in ensuring the application of the principle of equal remuneration for men and women for work of equal value, including providing training regarding the concept of “work of equal value” and how to apply it in practice, the Committee of Experts has encouraged all States to consider taking such action.¹⁷

¹³ General Survey on labour inspection, ILO, 2006, paragraphs 176-178.

¹⁴ See article 6 of Convention No. 81.

¹⁵ General Survey on labour inspection, ILO, 2006, paragraphs 180, 183 and 204.

¹⁶ *Ibid.*, paragraph 236. See Article 15(c) of Convention No. 81 and Article 20(c) of Convention No. 129.

¹⁷ General Observation concerning Convention No. 100, Committee of Experts, 2007.

4. Procedural obstacles

Protection against reprisals and standing

With respect to procedural obstacles to access to justice, the Committee of Experts has identified cost, delays, representation and standing, the burden of proof, and fear of victimization, in the context of monitoring the effective implementation of the ILO Conventions on equality.¹⁸ In particular, effective protection against reprisals for those who lodge complaints or bring cases, and for witnesses, is essential in ensuring access to justice. In this connection, the Committee of Experts has observed that allowing trade unions to bring complaints is also important as it reduces the risk of reprisals and is also likely to serve as a deterrent to discriminatory action.¹⁹

Burden of proof

The Committee of Experts has also emphasized in its comments that the burden of proof can be an important obstacle in discrimination cases, particularly as much of the information needed in such cases is in the hands of the employer. It has welcomed the progress in a number of countries in amending legislation to provide for the shifting of the burden of proof to the employer in discrimination and equal remuneration cases, normally once the complainant has produced prima facie or plausible evidence of a violation. The Committee has considered that this is a useful means of correcting a situation that could otherwise result in inequality.²⁰

Remedies and sanctions

The importance of adequate remedies and sanctions has been stressed regularly by the Committee of Experts. For example, the Committee of Experts has indicated that addressing sexual harassment only through criminal proceedings is normally not sufficient, due to the sensitivity of the issue, the higher burden of proof, which is harder to meet, especially if there are no witnesses (which is often the case), and the fact that criminal law generally focuses on sexual assault or “immoral acts”, and not the full range of behaviour that constitutes sexual harassment in employment and occupation. In addition, legislation under which the sole redress available to victims of sexual harassment is termination of the employment relationship, while retaining the right to compensation, does not afford sufficient protection for victims of sexual harassment, since it in fact punishes them and could dissuade victims from seeking redress.²¹

¹⁸ General Survey on fundamental Conventions, ILO, 2012, paragraph 884.

¹⁹ *Ibid.*, paragraph 886 .

²⁰ *Ibid.*, paragraph 885.

²¹ *Ibid.*, paragraph 792.

In the context of protection against victimization, where someone has been dismissed due to raising a complaint, the Committee of Experts has observed that reinstatement is normally the most appropriate remedy.²²

5. Practical and economic challenges

The role of employers' and workers' organizations, including with respect to awareness-raising and legal assistance

The CEDAW Committee has stated that achieving substantive equality within the meaning of article 15 involves ensuring that legal literacy and legal aid are accessible to women to claim their rights (Concept Note, chapter III, paragraph 1). It has also referred to the importance of family, community and other support services to overcome the numerous practical and economic obstacles preventing women to seek redress (Concept Note, chapter IV, paragraph A-4).

In this connection, both Conventions Nos. 100 and 111 recognize the important role of employers' and workers' organizations in the implementation of the rights set out in these Conventions (Article 4 and article 3(a), respectively).

It is important that an emphasis is put on the role of organizations, including workers' and employers' organizations, in enhancing legal literacy of the general public, including women in particular, and providing legal aid for victims in seeking redress.

6. Additional challenges faced by specific groups of women

Indigenous women

In its comments, the Committee of Experts has noted that many indigenous women face additional discrimination based on gender in the labour market and within their communities, including limited access to land and material goods.²³

With respect to access to justice, the Indigenous and Tribal Peoples Convention, 1989 (No. 169) contains a specific provision which provides that the indigenous and tribal peoples shall be able to take legal proceedings, either individually or through their representative bodies, for the effective protection of the rights set out in the Convention, and that measures shall be taken to ensure that members of these peoples can understand and be understood in legal proceedings, where necessary through the provision of interpretation or by other effective means (Article 12).

²² General Survey on fundamental Conventions, ILO, 2012, paragraph 886.

²³ *Ibid.*, paragraph 769.

Women migrant workers

For a number of years, the Committee of Experts has been paying attention to the situation of women migrant workers, including the obstacles they face with respect to access to justice. In order for women migrant workers to effectively exercise their right to equal treatment, it is important that they have access to the courts in the same conditions as nationals.²⁴ Under article 6(1)(d) of the Migration for Employment Convention (Revised), 1949 (No. 97), equality of treatment must apply in respect of “legal proceedings” relating to the matters referred to in Convention No. 97. In this connection, the importance of access to interpretation and translation in the process of administration of justice for language minorities may also be recalled.

In the context of lodging complaints with the various judicial, quasi-judicial and administrative bodies, the Committee of Experts has pointed out that the fear of reprisals of victimization is a particular concern in the case of migrant workers.²⁵

Women domestic workers

Recent estimates of domestic workers indicated that, as of the year 2010, of the 52.6 million domestic workers worldwide, the vast majority were women (83 per cent), accounting for 7.5 per cent of female wage employment worldwide.²⁶ The Domestic Workers Convention, 2011 (No. 189) provides for the State’s obligation to take measures to ensure effective access for domestic workers to courts, tribunals or other dispute resolution mechanisms under conditions that are not less favourable than those available to workers generally (Article 16).

Women workers in the informal economy

With regard to the application of the ILO Conventions including in the informal economy, the Committee of Experts has called on States to strengthen the capacity and expand the reach of the labour inspectorate.²⁷

7. Collecting, analysing and publishing statistics

The importance of statistics should also be emphasized in addressing access to justice. Collecting, analysing and publishing statistics on the nature and number of complaints lodged with the various judicial, quasi-judicial and administrative bodies is essential in identifying the problems and the progress made in ensuring access to justice.

²⁴ General Survey on migrant workers, ILO, 1999, paragraph 447.

²⁵ General Survey on fundamental Conventions, ILO, 2012, paragraph 870.

²⁶ *Domestic work policy brief: Global and regional estimates on domestic workers*, ILO, 2011.

²⁷ General Survey on fundamental Conventions, ILO, 2012, paragraph 968.

The Committee of Experts has observed that where no cases or complaints, or very few, are being lodged, this is likely to indicate a lack of an appropriate legal framework, lack of awareness of rights, lack of confidence in or absence of practical access to procedures, or fear of reprisals. The lack of complaints or cases could also indicate that the system of recording violations is insufficiently developed.²⁸

In addition, statistics on the number of the courts, including labour tribunals, offices of the labour inspectorate and the equality bodies both in the urban and rural areas, are essential in order for States to take measures to increase physical accessibility to justice.

In order to help to address the under-representation of women in the administration of justice, statistics are also important with regard to the number of men and women who work at the various levels of the administration of justice.

CONCLUSION

The scope of the notion of “justice” and “justice systems” under the proposed General Recommendation may cover not only the courts including labour tribunals, but also the labour inspectorate and the specialized equality and equal pay bodies whose role in addressing discrimination against women has been increasing over the years.

In addressing the institutional obstacles to access to justice, providing adequate financial and human resources to the institutions concerned as well as appropriate conditions of work and training to the officials in the various instances may be examined with regard to judges, labour inspectors as well as the staff of the specialized equality and equal pay bodies. With respect to procedural obstacles, the importance of appropriate remedies available to victims and adequate sanctions to be imposed may also be stressed. An emphasis may also be put on the issue of the burden of proof in discrimination and unequal pay cases, including in the specific context of sexual harassment in employment and occupation. Furthermore, the issue of standing, with the possibility of extending it to workers’ organizations may be highlighted, in order to avoid the fear of reprisals or victimization, and the importance of the role of employers’ and workers’ organizations in awareness-raising and legal assistance to victims may also be recalled.

It is suggested that specific categories of women who face additional challenges in accessing justice include indigenous women, women migrant workers, women domestic workers and women workers in the informal economy.

In order to assess the needs and monitor the progress made with respect to access to justice, Member States may be requested to provide statistical information on the

²⁸ General Survey on fundamental Conventions, ILO, 2012, paragraph 870.

following: (i) the nature and number of complaints lodged with the various judicial, quasi-judicial and administrative bodies, including the labour inspectorate and the equality bodies; (ii) the number and geographical distribution of courts, including labour tribunals, labour inspection services and equality bodies, both in the urban and rural areas; and (iii) the number of men and women at each lever of the courts and law enforcement officials, including labour inspectors.