The Scope of States' Obligations under the Inter-American System Concerning the Guarantees of Trade Union Freedom, its Relation to Other Rights and its Application from a Gender Perspective

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With Annexed Report by Oxford Pro Bono Publico

ABOUT

THE BONAVERO INSTITUTE OF HUMAN RIGHTS

The Bonavero Institute is a research institute within the Faculty of Law at the University of Oxford. It is dedicated to fostering world-class research and scholarship in human rights law, to promoting public engagement in and understanding of human rights issues, and to building valuable conversations and collaborations between human rights scholars and human rights practitioners.

This Bonavero Report was prepared by Professor Kate O'Regan, Director of the Bonavero Institute and Dr Annelen Micus, Head of Programmes at the Bonavero Institute in response to a request received from the Inter-American Court of Human Rights on 14 October 2019 asking the Bonavero Institute for a written opinion regarding the request to the Court for an Advisory Opinion with respect to the "Scope of States obligations under the Inter-American System concerning the guarantees of trade union freedom, its relation to other rights and its application from a gender perspective", in accordance with Article 64(1) of the American Convention on Human Rights. This Bonavero Report draws on a research report prepared by the student-led pro bono research group at the University of Oxford, Oxford Pro Bono Publico, under the guidance of Professor O'Regan and Dr Micus, which is annexed. The Bonavero Institute expresses its gratitude to Oxford Pro Bono Publico for its assistance.

OXFORD PRO BONO PUBLICO

Oxford Pro Bono Publico (OPBP) provides pro bono legal research, particularly in the fields of international and comparative law, to individuals and organisations who are themselves working on a pro bono basis. In particular, graduate students and supervisors from the Faculty of Law prepare or assist in the preparation of research briefs, expert opinions, amicus curiae briefs, policy submissions, and reports. Over the past 14 years, OPBP has produced more than 40 projects for around 25 project partners across 12 different jurisdictions.

THE SCOPE OF STATES' OBLIGATIONS UNDER THE INTER-AMERICAN SYSTEM CONCERNING THE GUARANTEES OF TRADE UNION FREEDOM, ITS RELATION TO OTHER RIGHTS AND ITS APPLICATION FROM A GENDER PERSPECTIVE

On July 31, 2019, the Inter-American Commission on Human Rights submitted a request (the request) to the Secretariat of the Inter-American Court of Human Rights, for an Advisory Opinion in accordance with Article 64(1) of the American Convention on Human Rights, asking the Court to interpret and determine the *"Scope of States' obligations under the Inter-American System concerning the guarantees of trade union freedom, its relation to other rights and its application from a gender perspective"*.

The request seeks clarification on a wide range of matters. This report does not address all the issues raised in the request. It focuses on questions (d) and (e) in the request, which concern the intersection between the guarantee of trade union freedom and gender equality. The report provides an overview of how this intersection is addressed in several different international law regimes and in two national jurisdictions, India and Canada. The international law regimes considered are the International Labour Organization (ILO), the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the European Convention on Human Rights (ECHR), and European Union law (EU law).

In order to prepare the report, the Bonavero Institute commissioned research by the student-led research organization at the University of Oxford, Oxford Pro Bono Publico. The Bonavero Institute asked Oxford Pro Bono Publico to answer two research questions in relation to the five regimes of international law mentioned in the previous paragraph, and two research questions in relation to two national jurisdictions, India and Canada. The research questions are set out in the report prepared by Oxford Pro Bono Publico which is annexed to this report. The Bonavero Institute would like to express its gratitude to Oxford Pro Bono Publico for its assistance.

I. International Law

All five international law regimes examined here address in some measure the relationship between trade union freedoms and gender equality.

a. The ILO

ILO Convention No. 87 and ILO Convention No. 98 are an important starting point in that they assert the duty to respect and protect the autonomy and independence of workers' and employers' organizations, and so restrict the right of governments to regulate workers' and

employers' organizations. But ILO Convention No. 111 is of equal importance. It seeks to eliminate all forms of discrimination in employment and requires that any national policy adopted to eliminate discrimination on grounds related to sex should also be observed by workers' organizations. ILO Recommendation No. 111 provides that national policy for the prevention of discrimination in employment and occupation should have regard to a number of principles, including the principle that workers' organizations should not practice discrimination in respect of admission, retention of membership or participation in their affairs. Recommendation No. 111 also provides that parties to collective bargaining should respect the principle of equality of opportunity and treatment and should ensure that collective agreements contain no discriminatory provisions. It follows that there is a delicate balance to be struck between two principles entrenched in ILO law: the autonomy of trade unions (and therefore not interfering in their internal affairs) and gender equality. In its General Survey on the fundamental Conventions concerning the rights at work published in 2012, the Committee of Experts on the Application of Conventions and Recommendations ('CEACR') affirmed that the rights under Conventions 87 and 98 "should be guaranteed without distinction or discrimination of any kind as to … sex" (CEACR, General Survey (2012) at p. 38) and also noted that a number of trade unions and employers' organizations have been seeking ways to make their own membership and executive bodies more representative by establishing quotas or targets for women …". The CEACR welcomed and encouraged these initiatives, but also noted that they were "voluntary" (ibid. at p. 39).

b. CEDAW

Article 7 of CEDAW provides that States Parties are under a positive obligation to eliminate discrimination against women in the political and public life of the country and Article 11 provides that States Parties are under a positive obligation to prevent discrimination on the grounds of gender, sex, parental status or pregnancy in the field of employment. The provisions of the Convention have been considered in several General Recommendations of the CEDAW Committee, which will be of assistance to the Court. Most importantly, General Recommendation 23 confirms that the political and public life of a country includes the "activities of trade unions" (at para 5) and provides that States bear a positive obligation under CEDAW "to take appropriate measures … to ensure that organisations … such as trade unions which may not be subject directly to obligations under the Convention do not discriminate against women and respects the principles contained in Articles 7 and 8" (at para 42). The General Recommendation also notes that trade unions bear "an obligation to demonstrate their commitment to the principle of gender equality in their constitutions, in the application of those rules and in the composition of their memberships with gender-balanced representation on their executive boards so that these bodies may benefit from the full and equal participation of all sectors of society and from contributions made by both sexes" (at para 34). The Recommendation notes that participation in trade unions provides "a valuable training ground for women in political skills, participation and leadership" (ibid.). Finally, the General Recommendation provides that when reporting to CEDAW States Parties should provide information concerning the under-representation of women as members and officials of trade unions and "analyse the factors" that contribute to any such under-representation (at para

48(h)). Despite not mentioning explicitly the balance to be struck between trade union autonomy and gender equality that is a focus of the ILO system, we would suggest that CEDAW General Recommendation 23 is not inconsistent with an acknowledgement of the need to seek a careful harmonisation of the obligations of the State that flow from trade union freedoms and gender equality.

c. The ICESCR

The ICESCR is also relevant to a consideration of the intersection between trade union freedoms and gender equality. In Article 2(2) of the Covenant, States Parties undertake to guarantee that the rights in the Covenant may be exercised without discrimination, amongst other things, on the ground of sex and in Article 3, States Parties undertake to ensure the equal rights of men and women to the enjoyment of the rights in the Covenant. Article 7 provides that everyone has the "right to the enjoyment of just and favourable conditions of work" and Article 8 requires States Parties "to ensure that the right to form and join trade unions "subject only to the rules of the organization concerned" are protected. The importance of trade union autonomy is thus acknowledged in Article 8, which in addition provides for "the right of trade unions to function freely" (Article 8(1)(c)). The attention of the Court is drawn to General Comments 16, 20 and 23 published by the Committee on Economic, Social and Cultural Rights (CESCR), as well as the recent joint statement issued by the CESCR and the Human Rights Committee (E/C.12/2019/3-CCPR/C/2019/1 dated 23 October 2019) which affirms the importance of trade union freedoms and acknowledges that trade unions "should be allowed to function freely, without excessive restrictions on their functioning" (at para 3). The General Comments emphasize the importance of ensuring non-discrimination in relation to trade union freedoms. General Comment 16, for example, notes that particular attention should be given to ensure that women in marginalized occupations (for example, domestic workers, rural women, and women working in the home) are not deprived of their right to form and join trade unions (at para 25, and see also General Comment 20, para 3 and General Comment 23, para 47). General Comment 23 recognises that while only States are parties to the Covenant, business enterprises and trade unions "have responsibilities to realise the right to just and favourable conditions of work" (at para 74). The General Comments, too, recognize that discrimination is frequently encountered in the private sphere and require States Parties to "adopt measures … to ensure that individuals and entities in the private sphere do not discriminate on prohibited grounds" (see General Comment 20, para 11). This obligation would include an obligation upon States Parties to ensure that trade unions do not discriminate on prohibited grounds.

d. The ECHR

The European Court of Human Rights (ECtHR) has not yet considered the intersection between trade union freedoms and gender equality directly or comprehensively. Article 11 of the ECHR recognizes that the right to freedom of association includes the right to form and join trade unions. The ECtHR has recognised that the right to form trade unions incorporates a principle of trade union autonomy which includes, for example, the freedom of unions to regulate conditions of membership (see *Associated Society of Locomotive Engineers & Firemen v*

United Kingdom (2007) at para 37ff). The ECtHR has held that where the State intervenes in internal trade union matters, such intervention must comply with the requirements of Article 11(2), namely be "prescribed by law" and "necessary in a democratic society for one of the permitted aims" (see *Associated Society of Locomotive Engineers & Firemen v United Kingdom* (2007) at para 41). Article 14 of the ECHR prohibits discrimination in relation to the Convention rights, and Article 1 of Protocol 12 to the ECHR provides that any right set out in law must be "secured without discrimination on any ground" including sex. The scope of trade union freedom arose in the case of *Associated Society of Locomotive Engineers & Firemen v United Kingdom* (2007), where a trade union had expelled a member on the basis of his membership of a political party. The national tribunal had held that expulsion on grounds of membership of a political party was impermissible and the union was obliged to readmit the expelled member. The union approached the ECtHR asserting its freedoms under Article 11. The ECtHR held that there had been a violation of Article 11 by requiring the union to readmit the member, noting, amongst other things, that it had not been persuaded that the expulsion had impaired the member's freedom of expression or lawful political activities.

e. The EU

While EU treaty law does not explicitly assert a principle of gender equality in relation to trade union freedoms, the Court of Justice of the European Union (CJEU) decision in *International Transport Workers' Federation v Viking Line* (2007) recognises that Member States may impose restrictions on trade union rights in accordance with Union law. This principle could be relied upon to assert that States may regulate trade unions to ensure that they do not discriminate against women, in light of the non-discrimination provisions in the Treaty of the EU, the Treaty on the Functioning of the EU and particularly the Charter on Fundamental Rights of the EU. Unlike treaty law, EU Council Directive 2006/54/EC is more explicit in providing that discrimination is prohibited even "in relation to membership of, and involvement in, an organization of workers or employers, or any organization whose members carry on a particular profession, including the benefits provided for by such organizations" (Article 14(1)(d)). While the Treaty of the EU and the Treaty on the Functioning of the EU have provisions on gender equality, the most explicit non-discrimination provisions are Articles 21 and 23 of the Charter on Fundamental Rights of the EU. Member States of the EU are also under an obligation to accede to the Council of Europe Convention on Preventing and Combatting Violence against Women and Domestic Violence, which characterizes gender-based violence as discrimination. Council Directive 2006/54/EC is once again the most important anti-discrimination legislation. It prohibits discrimination on the ground of sex in matters of employment and occupation, and it has been interpreted by the CJEU and the ECJ to prohibit even discrimination based on gender, parental status and pregnancy. Council Directive 92/85/EEC and Council Directive (EU) 2019/1158 impose obligations on States to ensure equal treatment for pregnant women and parents and carers respectively. Council Directive 89/391/EEC also provides that every employer has a duty to ensure the 'safety and health of workers', which has been interpreted as prohibiting gender-based violence, including sexual harassment.

II. Domestic Law

There are aspects of the domestic law in India and Canada which might be of interest to the Court in preparing its Advisory Opinion.

a. India

In India, while there is no statute preventing trade unions from discriminating against women, the Supreme Court judgment in *Charu Khurana and Ors vs Union of India and Ors* (2015) struck down a clause of the Cine Costume Make-Up Artists and Hair-Dressers Association bye-laws that prohibited women from becoming members as it violated the constitutional right to equality before the law, the right to be free from discrimination on the grounds of sex, the right to practice any profession, and the right to life (construed as the right to a livelihood).

b. Canada

In Canada, federal legislation imposes obligations on trade unions and employee organizations to ensure that they do not discriminate against women. The two key pieces of legislation are the Human Rights Act and the Canadian Labour Code. Section 3(1) of the Human Rights Act lists the prohibited grounds of discrimination which include sex, sexual orientation, marital status and family status and section 3(2) provides that discrimination on the ground of pregnancy or childbirth shall be deemed to be discrimination on the ground of sex. Section 9 of the Human Rights Act provides that excluding a person from membership of an "employee organisation" on a prohibited ground of discrimination constitutes a discriminatory practice. Section 37 of the Canadian Labour Code provides that trade unions "shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees" in the relevant bargaining unit. The Code also prohibits trade unions from expelling or suspending members of the union and from denying membership to a person by applying the rules of the union in a discriminatory manner (section 95(f)). It also prohibits trade unions from taking disciplinary action against members by applying the union rules in a discriminatory manner (section 95(g)).

III. Conclusion

The review of the international law regimes and the domestic law in India and Canada illustrates that the intersection between trade unions freedoms and gender equality requires careful balancing and calibration. Both the freedom of association, which is the foundation of trade union autonomy, and the right to non-discrimination on the grounds of sex and gender are rights recognized as fundamental in international human rights law. Careful attention needs to be paid to ensuring that the rights are harmonised in an appropriate manner. We are sure that the Advisory Opinion of the Inter-American Court of Human Rights on this question will make a valuable contribution to illustrating how best to achieve that harmonization.

ANNEXURE

REPORT BY OXFORD PRO BONO PUBLICO

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Indemnity

Oxford Pro Bono Publico (OPBP) is a programme run by the Law Faculty of the University of Oxford, an exempt charity (and a public authority for the purpose of the Freedom of Information Act). The programme does not itself provide legal advice, represent clients or litigate in courts or tribunals. The University accepts no responsibility or liability for the work which its members carry out in this context. The onus is on those in receipt of the programme's assistance or submissions to establish the accuracy and relevance of whatever they receive from the programme; and they will indemnify the University against all losses, costs, claims, demands and liabilities which may arise out of or in consequence of the work done by the University and its members.

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INTRODUCTION

OPBP collaborated with the Bonavero Institute of Human Rights, to prepare a report on the scope of States' obligations arising from collective labour rights, and freedom from a gender perspective.

For this research, four research questions were identified: the first two guided the research undertaken in international law, and the second two guided research on domestic legal systems. The research questions were based on the request for an advisory opinion submitted to the Inter-American Court of Human Rights, and were formulated as follows:

1. Do States bear any positive obligation under the relevant provisions of international law to ensure that the rules and processes that regulate trade union formation, leadership elections, internal trade union governance, as well as collective bargaining and strikes (a) do not directly or indirectly discriminate against women; and/or (b) ensure the effective participation of women as trade union members and leaders; and/or (c) are free from gender-based violence?

2. Do the relevant rules of international law impose any positive obligations upon the State to prevent direct or indirect discrimination on the grounds of gender, sex, parental status or pregnancy and/or to prevent or address gender-based violence at work, including sexual harassment?

3. Are there any laws in the relevant legal system that impose obligations upon trade union organizations to ensure that the rules and processes that govern trade union formation, leadership elections, internal trade union governance procedures, as well as collective bargaining and strikes (a) do not directly or indirectly discriminate against women; and/or (b) ensure the effective participation of women as trade union members and leaders; and/or (c) are free from gender-based violence?

4. Are there any laws in the relevant legal system that (a) prohibit direct or indirect discrimination on the grounds of gender, sex, parental status or pregnancy; and/or (a) seek to prevent or address gender-based violence at work, including sexual harassment?

The Executive Summary below contains a brief summary of the results of the research. It is followed by the full report.

EXECUTIVE SUMMARY

I. International Law

Question 1: Do States bear any positive obligation under the relevant provisions of international law to ensure that the rules and processes that regulate trade union formation, leadership elections, internal trade union governance, as well as collective bargaining and strikes (a) do not directly or indirectly discriminate against women; and/or (b) ensure the effective participation of women as trade union members and leaders; and/or (c) are free from gender-based violence?

I.

a. ILO

ILO Convention No. 87 and ILO Convention No. 98 are of particular significance as far as regulating trade unions is concerned. According to the Committee of Experts on the Application of Conventions and Recommendations ('CEACR'), the primary objective of both these conventions is to protect the autonomy and independence of workers' and employers' organizations in relation to public authorities, both in their establishment and in their functioning and dissolution. They are two of the ILO's fundamental conventions and are instrumental in achieving gender equality and non-discrimination in the world of work. ILO Convention No. 111 is also of importance. When these conventions are read together, in light of the CEACR's observations, it becomes clear that trade unions also have an obligation to eliminate discrimination against women. While the broad aim of Convention No. 111 is to eliminate all forms of discrimination in law and practice in employment and occupation, it specifically requires that any national policy adopted to eliminate discrimination *inter alia* on grounds related to sex should also be observed by workers' organizations. Moreover, Recommendation No. 111 also provides that the national policy for the prevention of discrimination in employment and occupation should have regard to a number of principles, including the following: that workers' organizations should not practice or countenance discrimination in respect of admission, retention of membership or participation in their affairs; and that in collective negotiations and industrial relations the parties should respect the principle of equality of opportunity and treatment in employment and occupation, and should ensure that collective agreements contain no discriminatory provisions.

It is to be noted that there is a delicate balance to be struck under ILO principles between protecting the autonomy of trade unions (and therefore not interfering in their internal affairs) and protecting and promoting gender equality. This is acknowledged by the CEACR. In General Survey 2012, the CEACR noted that 'to allow the authorities to determine the composition of the congress and the presiding officers of trade unions' would constitute interference with their internal administration and would be contrary to Convention No. 87.

b. CEDAW

According to Article 7 of the CEDAW, States Parties to CEDAW are under a positive obligation to eliminate discrimination against women in the political and public life of the country. General Recommendation 23 confirms that the political and public life of a country includes the 'activities of trade unions.' Although there is no specific mention of direct or indirect discrimination, reading and applying General Recommendation 28, it is understood that States have an obligation to eliminate both direct and indirect discrimination in the activities of trade unions. It is likely that trade union activities extend to trade union formation, leadership elections and internal trade union governance. It is not clear whether they also extend to collective bargaining and strikes. General Recommendation 23 demonstrates that States bear a positive obligation under CEDAW to ensure the effective participation of women as trade union members and leaders. General Recommendation 19 provides that 'the definition of discrimination includes gender-based violence'. As a result, it is concluded that the obligation under Article 7 of the Convention to 'take all appropriate measures to eliminate discrimination against women in the political and public life of the country', includes an obligation to eliminate gender-based violence in the activities of trade unions.

Given the strong obligations imposed upon trade unions by CEDAW to act positively to promote gender equality, the CEDAW system may be of particular assistance to the Inter-American Court of Human Rights in formulating its advisory opinion.

c. ICESCR

Under the ICESCR, States bear positive obligations on all three fronts mentioned in the question. In sum, ICESCR provisions (Articles 2(2), 3, 8) and the General Comments (GC 16, 20, 23) issued by the Committee on Economic, Social and Cultural Rights emphasize the importance of ensuring non-discriminatory access to the right to form trade unions and to strike. They also speak to the need for both public and private actors, which would include trade unions, to take steps to eliminate gender discrimination. It is to be noted that discrimination has been understood by the Committee in very broad terms. As a result, it stands to reason that States must remove any legal obstacles preventing women from effectively participating in trade unions in their chosen capacity, subject to meeting the qualifying criteria.

d. ECHR

The European Court of Human Rights has not directly considered this question yet. However, Article 11 of the European Convention on Human Rights (ECHR) recognizes trade union rights through both negative and positive obligations, whereas Article 14 of the ECHR prohibits discrimination through both negative and positive obligations. These two provisions, when read together, could give rise to positive obligations on the State to protect the interests of women in trade unions. It is telling that in cases like *Associated Society of Locomotive Engineers & Firemen v United Kingdom*, the Court has already held that for an individual's right to join a union to be effective, the State must protect their right to equality first. While the case did not

consider women's rights *per se*, it called for prevention of any form of abuse of a dominant position in trade unions – thus, implying that there is scope for reading a gender perspective into trade union rights in the ECHR.

e. EU Law

While EU treaty law does not explicitly lay down rights of women in trade unions, by virtue of the decision of the CJEU in *Viking*, Member States are entitled to impose restrictions on trade union rights in accordance with Union law. Arguably, this could mean that States *may* regulate trade unions to ensure that they do not discriminate against women, in light of all the non-discrimination provisions in the Treaty of the EU, the Treaty on the Functioning of the EU and particularly the Charter on Fundamental Rights of the EU. Unlike treaty law, EU Council Directive 2006/54/EC is more explicit in saying that discrimination is prohibited even "in relation to membership of, and involvement in, an organization of workers or employers, or any organization whose members carry on a particular profession, including the benefits provided for by such organizations" (Article 14(d)).

Question 2: Do the relevant rules of international law impose any positive obligations upon the State to prevent direct or indirect discrimination on the grounds of gender, sex, parental status or pregnancy and/or to prevent or address gender-based violence at work, including sexual harassment?

I.

a. ILO

While this question does not directly address the obligations of States in respect of trade unions, it is a useful guide on the more general non-discrimination obligations that States have, which may require them to prevent discrimination even in trade unions. Therefore, for a holistic appreciation of the non-discrimination obligations of States vis-à-vis trade unions, it is important that the general obligations addressed under this question also be considered.

Under the ILO, positive obligations are imposed upon States to prevent direct or indirect discrimination on the grounds of gender, sex, parental status or pregnancy and/or to prevent or address gender-based violence at work, including sexual harassment. ILO Convention No. 111 aims to eliminate all forms of discrimination in law and practice in employment and occupation. To do that, States are required to develop and implement a multifaceted national equality policy. ILO Convention No. 156 and Recommendation No. 165 aim to further equality between men and women workers. Specifically, they aim to do so through promoting equality of opportunity and treatment between men and women workers with family responsibilities and between men and women workers with family responsibilities and workers without such responsibilities. ILO's Maternity Protection Convention (Convention No. 183 and Recommendation No. 191) contains provisions that both directly and indirectly aim to tackle discrimination against pregnant and breastfeeding women workers. Recognising that violence and harassment in the world of work can constitute a human rights violation or abuse, and that these are a threat to equal opportunities, unacceptable and incompatible with decent work, the

ILO General Conference recently adopted Convention No. 190 (not yet in force) to tackle violence and harassment in the world of work, including gender-based violence and harassment, as well as Recommendation No. 206 concerning the Elimination of Violence and Harassment in the World of Work. These instruments provide guidance on how to address and eliminate violence and harassment in the world of work.

b. CEDAW

Article 11 of the CEDAW demonstrates how States Parties to CEDAW are under a positive obligation to prevent discrimination on the grounds of gender, sex, parental status or pregnancy in the field of employment. General Recommendation 19 elaborates how States Parties to CEDAW are under a positive obligation to prevent and address gender-based violence at work, including sexual harassment.

c. ICESCR

The ICESCR imposes positive obligations on States to prohibit discrimination based on gender/sex, pregnancy and parentage. The prohibition of sex-based discrimination in the Covenant is no longer just confined to physiological characteristics. Rather, it also covers gender stereotypes, prejudices and the notion of gender roles. It also obligates them to take measures against sexual harassment at the workplace (General Comment 23).

d. ECHR

The European Convention on Human Rights imposes positive obligations on States to ensure gender equality, by virtue of Article 1 read with Article 14 of the Convention and Article 1 of Protocol No. 12 to the Convention, which prohibit gender-based discrimination. The Court has interpreted the Convention as prohibiting both direct and indirect discrimination. Significantly, it prohibits discrimination based on sex, gender and parental status. Further, the Court has also found that gender-based violence constitutes a form of prohibited discrimination against women. Since Article 8 of the Convention has been interpreted as covering the sphere of employment, when it is read with Article 14 of the Convention, it becomes clear that gender-based violence at workplaces is prohibited by the Convention.

e. EU Law

While the Treaty of the EU and the Treaty on the Functioning of the EU have provisions on gender equality, the most explicit non-discrimination provisions are Articles 21 and 23 of the Charter on Fundamental Rights of the EU. Member States of the EU are also under an obligation to accede to the Council of Europe Convention on Preventing and Combatting Violence against Women and Domestic Violence, which characterizes gender-based violence as discrimination. Council Directive 2006/54/EC is once again the most important anti-discrimination legislation. It prohibits discrimination on the ground of sex, and it has been interpreted by the CJEU and the ECJ to prohibit even discrimination based on gender, parental

status and pregnancy. Council Directive 92/85/EEC and Council Directive (EU) 2019/1158 impose positive obligations on States to ensure equal treatment for pregnant women and parents and carers respectively. Council Directive 89/391/EEC also provides that every employer has a duty to ensure the 'safety and health of workers', which has been interpreted as prohibiting gender-based violence, including sexual harassment.

II. Domestic Law

Question 3: Are there any laws in the relevant legal system that impose obligations upon trade union organizations to ensure that the rules and processes that govern trade union formation, leadership elections, internal trade union governance procedures, as well as collective bargaining and strikes (a) do not directly or indirectly discriminate against women; and/or (b) ensure the effective participation of women as trade union members and leaders; and/or (c) are free from gender-based violence?

a. India

In India, while there is no statute preventing trade unions from discriminating against women, the Supreme Court judgment in *Charu Khurana and Ors vs Union of India and Ors* struck down a clause of the Cine Costume Make-Up Artists and Hair-Dressers Association bye-laws that prohibited women from becoming members as it violated the constitutional right to equality before the law, the right to be free from discrimination on the grounds of sex, the right to practice any profession, and the right to life (construed as the right to a livelihood). Moreover, India has obligations under international treaties like the ICESCR to eliminate discrimination against women in trade union settings.

b. Canada

In Canada, some federal legislation such as the Canadian Human Rights Act (sections 3, 9, 10, 14(1), 14(2), 15(1), 16) and the Canadian Labour Code (section 37, 69(2), 95, 247.2) impose obligations on trade unions and employee organizations to ensure that they do not discriminate against women. Moreover, Canada has obligations under ILO Conventions and the ICESCR to eliminate discrimination against women in trade union settings.

Question 4: Are there any laws in the relevant legal system that (a) prohibit direct or indirect discrimination on the grounds of gender, sex, parental status or pregnancy; and/or (a) seek to prevent or address gender-based violence at work, including sexual harassment?

While this question does not directly address how a certain State is regulating its trade unions, it is a useful guide on the more general non-discrimination obligations in that State's legal system, which may have consequences even for trade unions. Therefore, for a holistic appreciation of the non-discrimination obligations of trade unions, it is important that the general obligations addressed under this question also be considered.

a. India

In India, there are constitutional (Article 15 read with Article 14 of the Constitution) and statutory provisions (such as provisions in the Equal Renumeration Act 1976, Maharashtra Shops and Establishments Act 2017, Transgender Persons (Protection of Rights) Act 2019) that prohibit (direct) discrimination on the grounds of gender and sex. The Maternity Benefit Act 1961 prohibits the termination of employment of a pregnant woman employee and mandates the provision of maternity benefits to such women. The Sexual Harassment at Workplace (Prevention, Prohibition and Redressal) Act 2013 places employers under a positive duty to not only redress sexual harassment in the workplace but to prevent its occurrence. Moreover, it has similar commitments under international treaties like ILO Convention No. 111, the International Covenant on Civil and Political Rights (ICCPR) and the CEDAW.

b. Canada

In Canada, federal legislations such as the Canadian Charter of Human Rights and Freedom (section 15), the Canadian Human Rights Act (sections 3,14(1), 14(2)), the Canadian Bill of Rights (section 1), the Employment Equity Act (section 5 read with section 3), and the Public Service Employment Act prohibit discrimination on the grounds of sex/gender, parental status or pregnancy. Moreover, it has similar commitments under ILO Conventions, Inter-American Conventions, the ICCPR, the CEDAW, the North American Agreement on Labour Cooperation and the US-Mexico-Canada Agreement.

A. INTERNATIONAL LAW

I. International Labour Organization (ILO)

QUESTION 1: Do States bear any positive obligation under the relevant provisions of international law to ensure that the rules and processes that regulate trade union formation, leadership elections, internal trade union governance, as well as collective bargaining and strikes (a) do not directly or indirectly discriminate against women; and/or (b) ensure the effective participation of women as trade union members and leaders; and/or (c) are free from gender-based violence?

a. Introduction

The ILO is an international organization, and a specialized agency of the United Nations,[1] whose members are States.[2] The State representatives and delegates to the ILO organs, however, are not solely governmental representatives but rather comprise three stakeholder groups: government representatives, employers' representatives, and workers' representatives.[3]

The main function of the ILO is 'to prepare and adopt international labour standards in the form of Conventions and Recommendations'.[4] Such labour standards 'emerge from a concern that global action is needed to tackle a problem'.[5]

ILO Conventions are not automatically binding upon Member States by virtue of their adoption; rather, to create binding obligations for individual States, Conventions adopted by the International Labour Conference need to be ratified by each State.[6] Following ratification, State Parties have to make effective the provisions of such Conventions[7] and submit annual reports detailing the measures and actions taken to observe their obligations.[8] Usually, ILO

[1] Agreement between the United Nations and the International Labour Organization (signed 30 May 1946, entered into force 14 December 1946) 1 UNTS 184.
[2] Constitution of the International Labour Organization (as amended) (adopted 11 April 1919, entered into force 28 June 1919) 15 UNTS 40, art 1(2), (3) and (4).
[3] ibid, art 3(1), art 7(1).
[4] ibid, art 19(1); George P Politakis, 'The ILO's Standard-Setting: the first one hundred years' in Simon Chesterman et al (eds), *The Oxford Handbook of United Nations Treaties* (OUP 2019) 230; Eve C Landau and Yves Beigbeder, *From ILO Standards to EU Law: The Case of Equality Between Men and Women at Work* (Brill 2008) 13.
[5] Anne Trebilcock, 'Putting the Record Straight about International Labor Standard Setting' (2010) 21 Comp Lab L & Pol'y 553, 554.
[6] ILO Constitution (n 2) art 19(5)(b).
[7] ibid, art 19(5)(c). According to Politakis (n 4) 230, ratified ILO Conventions 'set out binding provisions implying state accountability for not applying them and regular control of their effective implementation by the supervisory organs' of the ILO.
[8] ILO Constitution (n 2) art 22. Despite the requirement to report annually in the ILO Constitution, reporting actually takes place every three years for the eight fundament Conventions and the four Governance Conventions (see <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:10011:0::NO::P10011_DISPLAY_BY,P10011_CONVENTION_TYPE_CODE:1,F> accessed 12 December 2019) and every five years for all other Conventions.

conventions do not vest individuals with specific rights but rather they obligate State Parties to adopt certain laws and regulations or pursue certain national policies and approaches in their regulation of the issues falling under a given convention.[9] Recommendations are not *per se* binding but, again, they have to be brought before the national authorities in whose competence the matters which the Recommendation is concerned with fall, for the purposes of the adoption of national legislation or other action.[10] Recommendations are usually, but not always, adopted in conjunction with and to complement an ILO convention and are to be read along with it.[11] Overall, through its Conventions and Recommendations, as well as other policy actions and initiatives, the ILO seeks to set international labour standards and harmonise national laws and policies, promoting the rights and protections granted to all workers worldwide.[12]

Finally, it needs to be noted that the observations and comments in this report are based not only on the text of the relevant ILO Conventions, Recommendations and Declarations but also on the General Surveys conducted by the Committee of Experts on the Application of Conventions and Recommendations ('CEACR') in the context of its monitoring and supervising the application of Conventions and Recommendations by ILO Member States, including those that have not ratified the relevant conventions. Although General Surveys are not *per se* binding, according to Rubin et al 'General Surveys provide a major authoritative source on current practice regarding the subject matter of the instrument dealt with, nationally and internationally and constitute (an up-to-date) distillation of ILO jurisprudence on the topic in question'.[13]

Trade union rights, especially workers' freedom of association and the right to organize, are one of the primary means through which conditions of work are improved and sustainable progress is achieved.[14] ILO Convention No. 87 and ILO Convention No. 98 are of particular significance as far as regulating trade unions is concerned. The primary objective of both Conventions, according to CEACR, is 'to protect the autonomy and independence of workers' and employers' organizations in relation to the public authorities, both in their establishment and in their functioning and dissolution'.[15] They are two of the ILO's fundamental conventions and are instrumental in achieving gender equality and non-discrimination in the world of work.[16]

[9] Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protectio*n (2nd edn, OUP 2019) 42–43.
[10] ILO Constitution (n 2) art 19(6)(b).
[11] Politakis (n 4) 230.
[12] ILO, 'Rules of the Game: A Brief Introduction to International Labour Standards' (rev edn, ILO 2014) 20 – 24; Politakis (n 4) 232.
[13] Neville Rubin, Evance Kalula and Bob Hepple, *Code of International Labour Law: Law, Practice and Jurisprudence* (CUP 2005) vol I, 60.
[14] Declaration concerning the Aims and Purposes of the Organization (Declaration of Philadelphia), Annex to ILO Constitution, I(b).
[15] Committee of Experts on the Application of Conventions and Recommendations, General Survey on the Fundamental Conventions concerning Rights at Work in light of the ILO Declaration on Social Justice for a Fair Globalization, Report III (Part 1B) Doc ILC.101/III/1B.docx (2012), [55].
[16] ibid [49].

In the 1998 ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up ('Declaration on Fundamental Principles'), it was reaffirmed that even if an ILO Member State has not ratified a Convention, it has 'an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights … namely: freedom of association and the effective recognition of the right to collective bargaining'.[17] This was later confirmed by the Committee of Freedom of Association ('CFA'), which held in the case of *The United Electrical, Radio and Machine Workers of America (UE) supported by Public Services International (PSI) against the United States* that it has the mandate to examine complaints alleging the violation of the freedom of association, irrespective of whether the State Party concerned has ratified the relevant ILO Conventions, such mandate stemming directly from the ILO Constitution and the fundamental aims and purposes of the Organization set out therein.[18] Therefore, the obligations under Conventions Nos. 87 and 98 are of relevance to all countries, whether they have ratified these Conventions or not.

b. Convention No. 87 on the Freedom of Association and Protection of the Right to Organise[19]

Convention No. 87 guarantees workers the right to organize. Although Convention No. 87 has no express provision regarding the right to strike, the CEACR has confirmed that the right to strike derives from Convention No. 87 and is an aspect of the freedom of association, and found that it is reaffirmed in many national Constitutions and legislative provisions as well as in international and regional instruments.[20]

Significantly, Article 2 of the Convention establishes the right of all workers and employers, *without distinction of* any *kind*, to establish and join organizations of their own choosing, subject only to the rules of such organization, and without prior authorization. Organization is defined as 'any organization of workers or of employers for furthering and defending the interests of workers or of employers'.[21] The provision applies to all workers and employers in the private and public sectors, and needs to be guaranteed both in law and in fact without discrimination of any kind, particularly based on race, nationality, *sex*, civil status, age, political opinions, occupation.[22]

With respect to their right to establish and join organizations of their own choosing, workers and employers are entitled to 'draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities and to formulate

[17] ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up, 86th session International Labour Conference (18 June 1998) (Annex revised 15 June 2010) available at <https://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm>.
[18] Committee on Freedom of Association, Case No 2460 (United States), Complaint date 7 December 2005, Report in which the Committee requests to be kept informed, Report No 344 (March 2007) para 985.
[19] (adopted 9 July 1948, entered into force 4 July 1950) 68 UNTS 17.
[20] General Survey 2012 (n 15) [117–9].
[21] Convention No. 87, art 10.
[22] General Survey 2012 (n 15) [53].

their programs' (Article 3(1)) and public authorities shall refrain from any interference with the lawful exercise of these rights (Article 3(2)).

General Survey 2012 has set out the two requirements for States to realize this protection: 1. 'national legislation should only lay down formal requirements respecting trade union constitutions, except with regard to the need to follow a democratic process and to ensure a right of appeal for the members'; 2. 'the constitutions and rules should only be subject to the verification of formal requirements by the authorities'.[23]

The CEACR has 'consistently emphasized that the rights under Conventions Nos 87 and 98 should be guaranteed without distinction and discrimination of any kind as to sex'.[24] However, in General Survey 2012, CEACR held that 'to allow the authorities to determine the composition of the congress and the presiding officers of trade unions' would constitute interference with their internal administration and would be contrary to Convention No. 87.[25] For example, the CEACR has accepted as compatible with the Convention US legislation that provides for a 'Bill of Rights' of trade union members to assure that all members have 'equal rights in nominating candidates for union office, voting in union elections and attending and participating in membership meetings'.[26] Legislation that goes beyond these requirements may constitute interference contrary to Article 3(2) of Convention No. 87. The CEACR has, however, encouraged 'voluntary initiatives' from trade unions and employers' organizations 'to make their own membership and executive boards more representative, by establishing quotas or targets for women or minority groups or by offering services of particular relevance to certain under-represented groups'.[27]

In the 2012 General Survey, the CEACR noted that in many States there were issues with the application of Convention No. 87 for certain categories of workers, like migrant workers and domestic workers, and that often the sectors excluded from the application of the Convention are 'predominantly female'.[28] Hence, the Committee considered important 'to examine the gender implications of the application of the Conventions to ensure that there is no direct or indirect discrimination against women', as 'all categories of workers should benefit from the rights and guarantees' under the Convention.[29] According to CEACR, in the legislation of most countries there is no distinction on the basis of sex for the exercise of trade union rights or it is expressly prohibited to discriminate based on sex.[30]

[23] ibid [100].
[24] ibid.
[25] ibid [112].
[26] ibid [100], [195].
[27] ibid [100].
[28] ibid [58].
[29] ibid [58].
[30] ibid [78].

c. Convention (No. 98) concerning the Application of the Principles of the Right to Organise and to Bargain Collectively[31]

Convention No. 98 protects all workers and their organizations both in the public and private sector from anti-union discrimination.[32] National laws and regulations are required under the Convention to provide adequate protection against anti-union discrimination and interference in the organizations,[33] while national laws and regulations are also to be adopted to encourage the negotiation between workers and employers of collective agreements to regulate employment.[34] The Convention also guarantees the right of collective bargaining to all workers' organizations.[35]

The text of the Convention, however, makes no mention of the discrimination against women or improving the participation of women.

d. Convention (No. 111) concerning Discrimination in respect of Employment and Occupation ('Convention No. 111')[36] and Recommendation (No. 111) on Discrimination (Employment and Occupation)[37]

Convention No. 111, along with Recommendation No. 111 which supplements it, are 'the most far-reaching instruments dealing with discrimination'.[38] Currently 175 States are parties to Convention No. 111. In any case, 'the elimination of discrimination in respect of employment and occupation' has been included in the 1998 Declaration on Fundamental Principles as one of the principles all ILO Member States are required to observe irrespective of whether they have ratified the relevant Convention or not.[39]

Convention No. 111 prohibits both direct and indirect discrimination. Direct discrimination is 'less favourable treatment …explicitly or implicitly based on one or more prohibited grounds', including sexual harassment and other forms of harassment,[40] and indirect discrimination arises when is 'apparently neutral situations, regulations or practices … in fact result in unequal treatment of persons with certain characteristics…when the same condition, treatment or criterion is applied to everyone, but results in a disproportionately harsh impact on some persons on the basis of characteristics such as … sex'.[41]

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[31] (adopted 1 July 1949, entered into force 18 July 1951) 96 UNTS 257.
[32] Convention No. 98, art 1; General Survey 2012 (n 15) [168].
[33] Convention No. 98, art 3.
[34] ibid, art 4.
[35] General Survey 2012 (n 15) [209].
[36] (adopted 25 June 1958, entered into force 15 June 1960) 362 UNTS 31.
[37] 25 June 1958, available at < https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312449:NO>.
[38] Landau and Beigbeder (n 4) 20.
[39] Declaration on Fundamental Principles (n 17) III(d).
[40] General Survey 2012 (n 15) [744].
[41] ibid [745–6].

A crucial provision of particular importance is Article 3 of Convention No. 111. While the broad aim of Convention No. 111 is to eliminate all forms of discrimination in law and practice in employment and occupation,[42] it specifically requires that any national policy adopted to eliminate discrimination *inter alia* on grounds related to sex also be observed by workers' organizations.[43] Moreover, the Discrimination (Employment and Occupation) Recommendation, 1958 (No. 111), also provides that the national policy for the prevention of discrimination in employment and occupation should have regard to a number of principles, including the following: "that workers' organizations should not practice or countenance discrimination in respect of admission, retention of membership or participation in their affairs; and that in collective negotiations and industrial relations the parties should respect the principle of equality of opportunity and treatment in employment and occupation, and should ensure that collective agreements contain no discriminatory provisions."[44]

QUESTION 2: Do the relevant rules of international labour law impose any positive obligations upon the State to prevent direct or indirect discrimination on the grounds of gender, sex, parental status or pregnancy and/or to prevent or address gender-based violence at work, including sexual harassment?

There are several ILO Conventions and Recommendations that directly or indirectly tackle issues of gender equality and discrimination.[45] Here, reference will be made to the instruments concerned primarily with such issues and will only incidentally refer to provisions from other instruments where relevant.

According to the General Survey on the Fundamental Conventions concerning Rights at Work of 2012 ('General Survey 2012') of the CEACR, '[e]quality and non-discrimination in employment and occupation is a fundamental principle and human right to which all men and women are entitled, in all countries and in all societies'.[46] Moreover, in the 2008 Declaration on Social Justice for Fair Globalization, the International Labour Conference also stressed that '[g]ender equality and non-discrimination must be considered to be cross-cutting issues' in achieving the ILO's strategic objectives.[47]

[42] ibid [731].
[43] Convention No. 111, art 3.
[44] General Survey 2012 (n 15) 38.
[45] See ILO, *Gender Equality and Decent Work: Selected ILO Conventions and Recommendations that Promote Gender Equality as of 2012* (International Labour Office 2012).
[46] General Survey 2012 (n 15) [649].
[47] ILO Declaration on Social Justice for a Fair Globalization, 97th session International Labour Conference (10 June 2008) para I(B) available at <https://www.ilo.org/global/about-the-ilo/mission-and-objectives/WCMS_099766/lang--en/index.htm>.

a. Convention (No. 111) concerning Discrimination in respect of Employment and Occupation ('Convention No. 111')[48] and Recommendation (No. 111) on Discrimination (Employment and Occupation)[49]

As stated above, the aim of Convention No. 111 is to eliminate all forms of discrimination in law and practice in employment and occupation.[50] To do that, States are required to develop and implement a multifaceted national equality policy. *The implementation of the national equality policy presupposes the adoption of a range of specific and concrete measures, including in most cases the need for a clear and comprehensive legislative framework, and ensuring that the right to equality and non-discrimination is effective in practice. Proactive measures are required to address the underlying causes of discrimination and de facto inequalities from deeply entrenched discriminations*.[51]

According to Convention No. 111, 'discrimination' is "any distinction, exclusion or preference made on the basis of, [inter alia] sex, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.[52] As stated earlier, discrimination covered by the Convention can be both direct and indirect.[53] According to the General Survey 2012, Convention No. 111 also applies to situations 'in which inequality is observed in the absence of a clearly identifiable author, as in some cases of indirect discrimination or occupational segregation based on sex'.[54]

Sex discrimination under Convention No. 111 covers discrimination "based on the biological characteristics, as well as unequal treatment arising from socially contracted rules and responsibilities assigned to a particular sex (gender). Gender roles and responsibilities are affected by age, race, class, ethnicity and religion, and by the geographical, economic and political environment."[55]

Additionally, the Committee has recognized the 'use of the concept of "***gender***" as a socio-economic variable to analyze roles, responsibilities, constraints, opportunities and needs of men and women' as an essential element of promotion of equality and non-discrimination.[56] Moreover, ***distinctions on the basis of pregnancy and maternity*** are discriminatory as they only apply to women workers.[57] Discriminatory are also provisions in national laws distinguishing on the basis of ***family responsibilities***.[58] It is also contrary to the Convention

[48] (adopted 25 June 1958, entered into force 15 June 1960) 362 UNTS 31.
[49] 25 June 1958, available at < https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312449:NO>.
[50] General Survey 2012 (n 15) [731].
[51] ibid.
[52] Convention No. 111, art 1(1)(a).
[53] General Survey 2012 (n 15) [744–6].
[54] ibid [745].
[55] ibid [782].
[56] ibid [782].
[57] ibid [784].
[58] ibid [785–6].

when national legislation imposes conditions on individuals of one sex not imposed on individuals of the other sex and on the basis of marital or civil status or family situation.[59] It is also prohibited discrimination based on sex the exclusion of women from certain roles and occupations.[60] Additionally, the CEACR stressed in General Survey 2012 that '***sexual harassment , as a serious manifestation of sex discrimination and a violation of human rights, is to be addressed within the context of the Convention***'.[61] States are required to take effective measures to eliminate sexual harassment and hostile working environments.[62]

Convention No. 111 'covers discrimination in relation to access to employment and to particular occupations, as well as terms and conditions of employment'.[63] State Parties are required under Article 2 of Convention No. 111 'to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in these fields'.[64] This according to CEACR in General Survey 2012 is the primary obligation of States under Convention No. 111.[65] Although States are granted flexibility under the Convention on how to implement their obligations, the primary objective and obligation of States 'cannot be compromised and implementation is measured by the effectiveness of the national policy and the results achieved'.[66] To be effective, the national policy needs to address the structural and underlying causes of discrimination, as for example with regard to occupational segregation based on sex,[67] as well as multiple discrimination (discrimination on more than one ground or discrimination on combined grounds, i.e. intersectional discrimination).[68] Additionally, the principle of the Convention applies to all aspects of employment and occupation,[69] including vocational training and education,[70] access to employment and particular occupations,[71] and terms and conditions of employment.[72] The measures under the national policy need to be 'concrete and specific' and make an 'effective contribution to the elimination of direct and indirect discrimination'.[73] States must adopt a range of measures, consisting in 'a combination of legislative and administrative measures, collective agreements, public policies, affirmative action measures, dispute resolution and enforcement mechanisms, specialized bodies, practical programmes and awareness raising'.[74]

[59] ibid [787].
[60] ibid [788].
[61] ibid [789–94].
[62] See also Convention No. 190 discussed in section II(e) and CEACR, 'General Observation: Discrimination (Employment and Occupation) Convention, 1958 (No. 111)' (2002) 91st ILC Session 2003.
[63] Convention No. 111, art 1(3); ILO 'Rules of the Game' (n 12) 42.
[64] ILO 'Rules of the Game' (n 12) 42.
[65] General Survey 2012 (n 15) [734].
[66] ibid.
[67] ibid [745].
[68] ibid [748].
[69] ibid [749].
[70] ibid [750–1].
[71] ibid [752–6].
[72] ibid [757–60].
[73] ibid [844].
[74] ibid [848].

Article 3 then enumerates a list of measures that State Parties should undertake in pursuance of the aforementioned national policy, including enacting legislation 'to secure the acceptance and observance of the policy', 'repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with the policy' and 'pursue the policy in respect of employment under the direct control of a national authority'.[75]

The Convention clarifies that measures taken in pursuance of protective policies for groups that require special protection either under other ILO Conventions and Recommendations or as a matter of national policy are not considered discriminatory for its purposes.[76] Such measures would include, for example, measures protecting workers with family responsibilities, older workers, persons with disability or maternity.[77] However, 'protective measures applicable to women's employment which are based on stereotypes regarding women's professional abilities and roles in society' violate the principle of the Convention.[78] Additionally, distinctions and differentiations based on the inherent requirements of the particular job are not deemed discriminatory, however this exception to the principle needs to be restrictively interpreted.[79] States cannot exclude *en masse* certain categories of works and occupations on the basis of "their inherent characteristics" as this would contravene the principles of Convention No. 111.[80]

Convention No. 111 applies to all workers in all sectors of economic activity in the private and public sectors. However, the exclusion of certain group of workers or certain branches of employment from the application of labour or employment law can create issues in the application of Convention No. 111 that tend to affect disproportionately women workers.[81] In that respect, the CEACR has 'recall[ed] the obligation of governments to ensure and promote the application of the principle of the Convention to all workers'.[82]

In the words of Landau and Beigbeder: "Since their [Convention No. 111 and Recommendation No. 111] adoption in 1958, the Committee of Experts on the Application of Conventions and Recommendations has noted a great variety of legislative and practical measures taken in a number of countries to eliminate discrimination and promote equality of opportunity and treatment particularly of women workers. Most countries have now formulated anti-discrimination policies, most often as legislation. Many have set up institutional bodies that are empowered to spur the national effort to ensure and promote equality."

The CEACR has also stressed the importance of monitoring and supervisory mechanisms to for the effective implementation of the principle of equality and non-discrimination.[83] States

[75] Convention No. 111, art 3; see also Recommendation No. 111, [2].
[76] Convention No. 111, art 5.
[77] General Survey 2012 (n 15) [836–41].
[78] ibid [842].
[79] ibid [827], see [830] for distinctions particularly on the basis of sex.
[80] ibid [828].
[81] ibid [738–42].
[82] ibid [742].
[83] ibid [868].

Parties have been asked to provide the CEACR with detailed statistics on men and women in the world of work and to enhance the powers and awareness, skills and qualifications of all competent national authorities, including labour inspectors and judges, to deal with such issues.[84]

b. Convention (No. 156) concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities ('Convention No. 156')[85] and Recommendation No. 165 concerning Workers with Family Responsibilities ('Recommendation No. 165')[86]

According to the General Survey on Workers with Family Responsibilities of 1993 ('General Survey 1993'), "in spite of the growth of women's labour force attachment, gender inequality in the labour market has persisted. It has become evident that when working women are also expected to take primary responsibility for the family and household, inequality between the sexes is further reinforced. Because women are forced to adjust their work lives around their other obligations, they have unequal job opportunities, career prospects and job status and consequently, reduced income and job security."[87] This in turn does not only harm the persons and families involved, but rather has far-reaching consequences for the economy as a whole.[88] Therefore, the Committee observed that 'the creation of conditions to enable workers to choose the type of employment best suited to their individual family circumstances, free from discriminatory constraints…is fundamental to the principle of equality of opportunity and treatment in employment'.[89]

One of the main purposes of Convention No. 156 and Recommendation No. 165 is to further equality between men and women workers.[90] Specifically, they aim to do so through promoting equality of opportunity and treatment between men and women workers with family responsibilities and between men and women workers with family responsibilities and workers without such responsibilities.[91]

The Convention covers not only men and women workers with dependent children (Article 1(1)) but also workers 'with responsibilities in relation to other members of the immediate family who clearly need their care or support' (Article 1(2)). Both the term 'dependent child' and the term 'other member of the immediate family who clearly needs care or support' are to be defined by each State Party through one of the means listed in Article 9 of the Convention

[84] ibid [871].
[85] (adopted on 23 June 1981, entered into force 11 August 1983) 1331 UNTS 295.
[86] 23 June 1981, available at <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R165>.
[87] Committee of Experts on the Application of Conventions and Recommendations, General Survey on Workers with Family Responsibilities, Report III (Part 4B) 80th session ILC (1993) [71].
[88] ibid [72–74].
[89] ibid [266].
[90] ibid [278].
[91] ibid [25].

(Article 1(3)), including, among others, laws, regulations, collective agreements, work rules, judicial decisions or any other means consistent with national practice.[92] This, according to General Survey 1993, allows for 'the wide variation in the definition of family and the nature of the individual's duties toward it in the different societies'.[93] Although there is no such requirement in the Convention, a number of States also prohibit discrimination on the basis of 'marital status', 'family situation' or 'civil status/situation', as well as due to pregnancy or maternity-related conditions.[94]

Convention No. 156 applies to 'all branches of economic activity and all categories of workers',[95] both in the public and private sectors.[96]

According to Article 3 of the Convention No. 156, State Parties are to make it an objective of national policy to enable persons with family responsibilities to exercise their right to engage in employment 'without being subject to discrimination, and to the extent possible, without conflict between their employment and their family responsibilities'. For the definition of 'discrimination' the Convention refers back to the definition of the term in Convention No. 111,[97] and hence, according to General Survey 1993, such national policies 'should aim at eliminating any distinction, exclusion or preference made on the basis of family responsibilities'.[98]

Given that Convention No. 156 generally falls within the broader legal framework aimed at promoting equality between men and women, in the case of State Parties to both Conventions No. 111 and No. 156 the national policy of Article 3 Convention No. 156 should be included in the national policy formulated under Article 2 of Convention No. 111.[99]

According to General Survey 1993, Convention No. 156 and Recommendation No. 165 'seek not merely to prohibit direct and indirect discrimination' for men and women workers with family responsibilities regarding 'recruitment, terms and conditions of employment and dismissal' but the labour standards set forth in these instruments 'call for the adoption of measures designed to promote the conditions in which workers with family responsibilities may enjoy full and genuine equality with other workers'.[100]

Article 8 of the Convention specifically provides that '[f]amily responsibilities shall not, as such, constitute a valid reason for termination of employment', while Recommendation No.

[92] For examples on the various means of implementation chosen from ILO Member States, see ibid [82–89].
[93] ibid [36].
[94] ibid [33].
[95] Convention No. 156, art 2; General Survey 1993 (n 87) [46–48] as cited in Rubin et al (n 13) 531.
[96] General Survey 1993 (n 87) [48].
[97] Convention No. 156, art 3(3).
[98] General Survey 1993 (n 87) [55] as cited in Rubin et al (n 13) 532.
[99] General Survey 1993 (n 87) [58].
[100] ibid [96].

165 goes further suggesting that also 'marital status' and 'family situation' should not constitute such valid reasons.[101]

Among the measures that the Committee has considered necessary in promoting equality of opportunity and treatment for men and women workers with family responsibilities are provisions regarding training and employment, including facilitation of entry and re-entry in the labour market,[102] the improvement of working conditions, including working hours, overtime, leave and part-time or homework,[103] the adoption of fitting social security and fiscal measures, including taxation measures,[104] and the creation of child-care and family facilities and services and provide assistance to workers in the exercise of family responsibilities.[105]

To secure the effectiveness of the aforementioned national policies under Article 3 of Convention No. 156, it is also necessary to commit to 'a major campaign of sensitization in order to promote widespread acceptance of the notion that the family is the concern of each individual' and that both men and women workers should be able to participate equally in the workforce and be able to take care of their family responsibilities.[106]

c. Convention (No. 183) concerning the revision of the Maternity Protection (revised) ('Convention No. 183') and Recommendation (No. 191) concerning the revision of the Maternity Protection Recommendation ('Recommendation No. 191')[107]

The ILO has a long-standing tradition of protecting maternity rights, with the third ILO Convention in 1919 being Convention No. 3 concerning the Employment of Women Before and After Childbirth ('Maternity Protection Convention').[108] The Maternity Protection Convention was later revised in 1952 with Convention No. 103 concerning Maternity Protection (revised)[109], which was in turn revised in 2000 with Convention No. 183 concerning the revision of the Maternity Protection Convention (revised).[110]

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[101] Recommendation No. 165, [16]. See also Convention (No. 158) concerning Termination of Employment at the Initiative of the Employer (adopted 22 June 1982, entered into force 23 November 1985) 1412 UNTS 3, which in art 5(d) includes 'sex', 'marital status' and 'family responsibilities' as grounds not constituting valid reasons of termination of employment.
[102] General Survey 1993 (n 87) [96]; Recommendation No. 165, [12-5].
[103] General Survey 1993 (n 87) [133]; Recommendation No. 165, [17–23].
[104] General Survey 1993 (n 87) [173]; Recommendation No. 165, [27–31].
[105] General Survey 1993 (n 87) [192]; Convention No. 156, art 5; Recommendation No. 165, [24–26], [32–34].
[106] General Survey 1993 (n 87) [90]; Convention No. 156, art 6; Recommendation No. 165, [10-11].
[107] 15 June 2000, available at <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312529:NO>.
[108] (adopted 29 November 1919, entered into force 13 June 1921) 38 UNTS 53.
[109] (adopted 28 June 1952, entered into force 7 September 1955) 214 UNTS 321. The ILO has declared Convention No. 103 an outdated instrument, see < https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312248:NO>.
[110] (adopted 15 June 2000, entered into force 7 February 2002) 2181 UNTS 253.

Article 1 of Convention No. 183 states that 'the term ***woman*** applies to any female person without discrimination whatsoever' and 'the term ***child*** applies to any child without discrimination whatsoever'.[111] The Convention also extends its protection to all women workers without exception in all branches of economic activity, including 'in atypical forms of dependent work',[112] although Article 2(2) grants some flexibility to State Parties to progressively realize this objective depending on their national circumstances.

The Convention contains provisions that both directly and indirectly aim to tackle discrimination against pregnant and breastfeeding women workers. On the one hand, Articles 4 to 7 grant employed pregnant or breastfeeding women protections with regard to their and their child's health, maternity leave and cash benefits. These provisions, although not as such concerned with non-discrimination, ensure that pregnant and breastfeeding women workers are not subject to discrimination in practice by creating the necessary conditions that allow women to both hold a profession and create a family without having to sacrifice one or the other. For example, national provisions on maternity leave, which according to Convention No. 183 must be at least 14 weeks long,[113] give women the opportunity to have a child while in a professional position and without endangering their health or their child's health. Importantly, Article 6(8) provides that '[i]n order to protect the situation of women in the labour market' cash benefits for maternity leave (under Article 4) and for leave in case of illness or complications (under Article 5) are to be granted through 'compulsory social insurance or public funds'[114] and are not to burden the individual employer.[115] As a result, social protection of pregnant and breastfeeding mothers is borne by the State itself, creating thus an incentive for employers to not discriminate against recruiting women workers in the case they might have to bear such monetary liabilities in the future.

Convention No. 183 also contains provisions that directly address non-discrimination in employment. Article 8(1) prohibits employers to dismiss women from their employment due to their pregnancy or during the time that they are on maternity leave or during such other time after they have returned to work as proscribed under the relevant national laws and regulations, unless it is for reasons unrelated to their pregnancy or nursing. The provision also shifts the burden of proof to the employer, namely the employer is the one to prove that dismissal is for reasons unrelated to the pregnancy or nursing.[116] Additionally, women workers are entitled to return after maternity leave or leave for illness or complications to the same or equivalent position as they possessed previously and be paid on the same rate.[117]

[111] Convention No. 183, art 1.
[112] ibid, art 2(1).
[113] See also Recommendation No. 191, [1].
[114] Convention No. 183, art 6(8), or 'in a manner determined by national law and practice'.
[115] ibid. There is the possibility for individual employers to be liable for the cash benefits themselves in case there was such a provision in national law previous to the ratification by the state of Convention No. 183 or in case there is subsequent agreement on that between the state party and the representative employers' and workers' organizations (ibid). See also Recommendation No. 191, [4].
[116] Convention No. 183, art 8(1).
[117] ibid, art 8(2).

Article 9 then requires that State Parties take measures 'to ensure that maternity does not constitute a source for discrimination in employment , including…access to employment'.[118] Such measures 'shall include a prohibition from requiring a test for pregnancy or a certificate for such test when a woman is applying to employment' except in the case that national laws or regulations prohibit or restricting the performance of such work by pregnant women or the work might endanger the health of the woman and her child.[119] The Convention also protects the right of women to breastfeed their child[120] and provides that periodically State Parties have to review the national laws and regulations concerning maternity leave and cash benefits to grant better protection if appropriate.[121] Recommendation No. 191 provides further guidance on appropriate measures that State Parties should take in promoting the protection of maternity and the position of women in the labour market.

d. Convention (No. 190) concerning the Elimination of Violence and Harassment in the World of Work ('Convention No. 190)[122] and Recommendation No. 206 concerning the Elimination of Violence and Harassment in the World of Work ('Recommendation No. 206')

Very recently, recognizing that 'violence and harassment in the world of work can constitute a human rights violation or abuse, and that violence and harassment are a threat to equal opportunities, unacceptable and incompatible with decent work',[123] the ILO General Conference adopted Convention No. 190 to tackle violence and harassment in the world of work, including gender-based violence and harassment, as well as Recommendation No. 206 concerning the Elimination of Violence and Harassment in the World of Work, and an accompanying Resolution.[124] These instruments are deemed to fill 'a normative gap and provide much-needed guidance to governments, workers, and employers' on how to address and eliminate violence and harassment in the world of work.[125] The Preamble of Convention No. 190 explicitly recognises that violence and harassment at work 'may prevent persons, particularly women, from accessing, and remaining and advancing in the labour market' and acknowledges that "gender-based violence and harassment disproportionately affects women and girls, and that an inclusive, integrated and gender-responsive approach, which tackles underlying causes and risk factors, including gender stereotypes, multiple and intersecting forms of discrimination, and unequal gender-based power relations, is essential to ending violence and harassment in the world of work."

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[118] ibid, art 9(1).
[119] ibid, art 9(2).
[120] ibid, art 10.
[121] ibid, art 11.
[122] (adopted 21 June 2019, not yet in force) available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:3999810:NO.
[123] Convention No. 190, preamble.
[124] 21 June 2019, available at https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_721160.pdf. The Resolution aims to promote and ensure the implementation of Convention No. 190 and Recommendation No. 206 through various measures.
[125] Eric S Carlson, 'The International Labour Organization's Innovative Approach to Ending Gender- Based Violence and Harassment: Toward a New International Framework for the World of Work' (2018) 33 ABA Journal of Labor and Employment Law 163.

Article 1 of Convention No. 190 includes definitions of both the terms 'violence and harassment' and of 'gender-based violence and harassment', although State Parties can under domestic laws provide for 'a single concept or separate concepts'.[126] 'Violence and harassment' are defined as: "A range of unacceptable behaviours and practices, or threats thereof, whether a single occurrence or repeated, that aim at, result in, or are likely to result in physical, psychological, sexual or economic harm, and includes gender-based violence and harassment."[127] 'Gender-based violence and harassment' for its part is defined as: "Violence or harassment directed at persons because of their sex or gender or affecting persons of a particular sex or gender disproportionately, and includes sexual harassment."[128]

The scope of Convention No. 190 is quite far-reaching. A crucial point to be noted is that it uses the phrase 'world of work' rather that workspace. The scope of this term has been elaborated upon in Article 3 of the Convention. This Convention applies to all 'workers and other persons in the world of work, including employees as defined by national law and practice' and persons working 'irrespective of their contractual status, persons in training, including interns and apprentices, workers whose employment has been terminated, volunteers, jobseekers and job applicants, and individuals exercising the authority, duties or responsibilities of the employer'.[129] The Convention covers both persons in the public and private sector, in the formal or informal economy, in both urban and rural areas.[130] It also covers violence and harassment in the workplace, but also, among others, places where the worker takes a break, uses sanitary or other facilities, in work-related trips, training and so forth, in employer-paid accommodation, while commuting from and to work, and through work-related communications.[131] However, it is to be noted that trade union activities have not been expressly mentioned in the Convention.

The obligations of State Parties are also quite broad under the Convention. First, all States that ratify the Convention have an obligation to 'respect, promote and realize the right of everyone to a world of work free from violence and harassment'.[132] Further, they have the obligation to adopt an 'inclusive, integrated and gender-responsive approach for the prevention and elimination' of violence and harassment at work, including violence and harassment involving third parties.[133] Article 4 provides that this approach includes:

a. prohibiting in law violence and harassment;
b. ensuring that relevant policies address violence and harassment;
c. adopting a comprehensive strategy in order to implement measures to prevent and combat violence and harassment;
d. establishing or strengthening enforcement and monitoring mechanisms;

[126] Convention No. 190, art 1(2).
[127] ibid, art 1(1)(a).
[128] ibid, art 1(1)(b).
[129] ibid, art 2(1).
[130] ibid, art 2(2).
[131] ibid, art 3.
[132] ibid, art 4(1).
[133] ibid, art 4(2).

e. ensuring access to remedies and support for victims;
f. providing for sanctions;
g. developing tools, guidance, education and training, and raising awareness, in accessible formats, as appropriate; and
h. ensuring effective means of inspection and investigation of cases of violence and harassment, including through labour inspectorates or other competent bodies.[134]

Article 6 of the Convention requires State Parties to adopt laws and regulations securing equality and non-discrimination at work, including for women and persons belonging to other vulnerable groups[135] (such as migrant workers) that are disproportionately affected by violence and harassment.

Article 9 requires State Parties to adopt laws and regulations that require employers to 'take appropriate steps commensurate with their degree of control to prevent violence and harassment… including gender-based violence and harassment', and particularly 'so far as reasonably practicable' to: "(a) adopt and implement, in consultation with workers and their representatives, a workplace policy on violence and harassment; (b) take into account violence and harassment and associated psychological risks in the management of occupational safety and health; (c) identify hazards and assess the risks of violence and harassment…and take measures to prevent and control them; and (d) provide to workers and other persons concerned information and training… including on the rights and responsibilities of workers and other persons concerned in relation to the policy referred to in subparagraph (a) of this Article."

Article 10 of Convention No. 190 sets out the obligations of State Parties regarding enforcement and remedies. State Parties have the obligations, among others, to 'monitor and enforce national laws and regulations regarding violence and harassment in the world of work', 'ensure easy access to appropriate and effective remedies and safe, fair and effective reporting and dispute resolution mechanisms and procedures' in violence and harassment cases, 'protect the privacy of those individuals involved', 'provide for sanctions', 'provide that victims of gender-based violence and harassment in the world of work have effective access to gender-responsive, safe and effective complaint and dispute resolution mechanisms, support, services and remedies', recognize the effects and mitigate the impact on the world of work of domestic violence, ensure that persons under an imminent and serious threat to their life, health or safety due to violence and harassment have the right to remove themselves from the work situation concerned, and that labour inspectorates and other relevant national authorities are empowered to deal with violence and harassment.

Recommendation No. 206 provides for more detailed guidance and proposals to assist State Parties in their implementation of the Convention. Paragraph 2 of Recommendation No. 206 states that in pursuing the inclusive, integrated and gender-responsive approach on violence

[134] ibid, art 4(2).
[135] Such as migrant workers or women migrant workers. According to Recommendation No. 206, [13], 'vulnerable groups' and 'groups in situations of vulnerability' under Article 6 of Convention No. 190 are to be interpreted in accordance with 'applicable international labour standards and international instruments of human rights'.

and harassment in the world of work under Article 4 of Convention No. 190 State Parties should address such issues in 'labour and employment, occupational safety and health, equality and non-discrimination law, and in criminal law, as appropriate'.

Paragraph 3 then recommends that State Parties *should ensure that all workers and employers, including those more exposed to violence and harassment, 'fully enjoy freedom of association and the effective recognition of the right to collective bargaining consistent with'* Convention No. 87 on the Freedom of Association and Protection of the Right to Organise and Convention No. 98 on the Right to Organize and Collective Bargaining. In particular, according to paragraph 4(a) State Parties should take appropriate measures promoting 'the effective recognition of the right to collective bargaining… as a means for preventing and addressing violence and harassment, and to the extent possible, mitigating the impact of domestic violence'.

The Recommendation further provides detailed guidance on what the workplace policy against violence and harassment under Article 9(a) of Convention No. 190 should include (paragraph 7) as well as the workplace risk assessment under Article 9(c) of Convention No. 190 which should pay particular attention to risks involving 'third parties such as clients, customers, service providers users, patients and members of the public' and arising 'from discrimination, abuse of power relations and gender cultural and social norms that support violence and harassment.[136]

On enforcement measures, Recommendation No. 206 lists a number of proposals that State Parties can adopt, including specific measures for complaint and dispute resolution mechanisms dealing with gender-based violence and harassment,[137] and measures for the support of and remedies to victims of gender-based violence and harassment, including support to re-enter the labour market, counselling and emergency services, and specialized police units and specially-trained officers.[138] Additionally, the Recommendation provides that labour inspectors and other officials in competent national authorities should undergo 'gender-responsive training' so as to be able to identify and address 'violence and harassment in the world of work, including psychological hazards and risks, gender-based violence and harassment, and discrimination against particular groups of workers'.[139] It also includes a number of other proposals regarding training and awareness-raising that State Parties should adopt, such as 'programmes aimed at addressing factors that increase the likelihood of violence and harassment… including... gender, cultural and social norms that support violence and harassment' (paragraph 23(a)), 'gender-responsive guidelines and training programmes' to public officials, such as judges, prosecutors and labour inspectors (paragraph 23(b)), and campaigns to raise public awareness 'that convey the unacceptability of violence and harassment, in particular gender-based violence and harassment, address discriminatory

[136] Recommendation No. 206, [8b],[8c].
[137] ibid [16].
[138] ibid [17].
[139] ibid [20].

attitudes and prevent stigmatization of victims, complainants, witnesses and whistle-blowers' (paragraph 23(d)).

Although Convention No. 190 is very recent and has not yet entered into force (according to Article 14(2), it will enter into force twelve months after at least two ILO Member States have registered their ratifications with the ILO Director General), and hence is not as such binding, its adoption by the ILO General Conference, which required the support of two thirds of the delegates, strongly indicates that issues of violence and harassment in the world of work, and in particular gender-based violence and harassment, are both pervasive and require comprehensive action by States and other relevant stakeholders and social partners in order to be addressed. Already in 2013, the Secretary-General of the International Organization of Employers said that in order to eliminate violence and harassment in the world of work it is necessary to address 'the root causes of discriminatory practices and being cognizant of their many different regional, cultural and social contexts'.[140]

It is to be noted that neither the Convention nor the Recommendation seem to extend to trade union activities explicitly.

[140] ILO, 'When work becomes a sexual battleground' (6 March 2013) available at <https://www.ilo.org/global/about-the-ilo/newsroom/features/WCMS_205996/lang--en/index.htm>.

II. Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)

Before responding to the research questions, an overview of the CEDAW definitions of three important terms will be provided.

a. Positive obligations

Article 2 of the Convention requires States Parties to 'pursue by all appropriate means and without delay a policy of eliminating discrimination against women'.[141] This establishes that States Parties are not just under a negative obligation to 'respect' (i.e. not to discriminate themselves), but also under positive obligations to 'protect' and 'fulfil' women's right to non-discrimination. This is confirmed by General Recommendation 28, which explains that 'the obligation to protect requires that States Parties protect women from discrimination by private actors', whilst 'the obligation to fulfil requires that States Parties take a wide variety of steps to ensure that women and men enjoy equal rights de jure and de facto'.[142] Consequently, it is clear that States Parties to CEDAW are under a general obligation to take positive steps to secure women's right to non-discrimination.

Article 2 of the Convention details a number of ways that States can comply with this general positive obligation. These include: '(a) … embody[ing] the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and … ensur[ing], through law and other appropriate means, the practical realisation of this principle, (b) … adopt[ing] legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women; (c) … establish[ing] legal protection of the rights of women on an equal basis with men and … ensur[ing] through competent national tribunals and other public institutions the effective protection of women against any act of discrimination; (d) … refrain[ing] from engaging in any act or practice of discrimination against women and … ensur[ing] that public authorities and institutions shall act in conformity with this obligation; (e) … tak[ing] all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women; (f) … tak[ing] all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women; [and] (g) … repeal[ing] all national penal provisions which constitute discrimination against women'.[143]

[141] Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 Dec. 1979) 1249 U.N.T.S. 13, 19 I.L.M. 33 (1980), *entered into force* 3 Sept. 1981 ('Convention'), art 2.
[142] Committee on the Elimination of Discrimination against Women, General Recommendation 28, art 9 (Forty-seventh session, 2010), UN Doc. CEDAW/C/GC/28 (2010) ('General Recommendation 28').
[143] Convention (n 141), art 2.

b. Discrimination against women

Article 1 of the Convention defines 'discrimination against women' 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'.[144] 'Direct discrimination' is defined by General Recommendation 28 as 'different treatment explicitly based on grounds of sex and gender differences'.[145] 'Indirect discrimination' is defined by General Recommendation 28 as 'when a law, policy, programme or practice appears to be neutral in so far as it relates to men and women, but has a discriminatory effect in practice on women because pre-existing inequalities are not addressed by the apparently neutral measure'.[146]

c. Gender-based violence

Importantly, General Recommendation 19 states that 'the definition of discrimination includes gender-based violence'.[147] Gender-based violence is defined as 'violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty'.[148]

States Parties to CEDAW hence are under a general obligation to take positive steps to eliminate gender-based violence. As regards the positive obligation to protect, General Recommendation 35 states that 'States Parties will be held responsible should they fail to take all appropriate measures to prevent, as well as to investigate, prosecute, punish and provide reparations for, acts and omissions by non-State actors that result in gender-based violence against women, including actions taken by corporations operating extraterritorially'.[149] As regards the positive obligation to fulfil, 'under the obligation of due diligence, States Parties must adopt and implement diverse measures to tackle gender-based violence against women committed by non-State actors, including having laws, institutions and a system in place to address such violence and ensuring that they function effectively in practice and are supported by all State agents and bodies who diligently enforce the laws. The failure of a State Party to take all appropriate measures to prevent acts of gender-based violence against women in cases in which its authorities are aware or should be aware of the risk of such violence, or the failure to investigate, to prosecute and punish perpetrators and to provide reparations to victims/survivors of such acts, provides tacit permission or encouragement to perpetrates acts

[144] ibid, art 1.
[145] General Recommendation 28 (n 142), art 16.
[146] General Recommendation 28 (n 142), art 16.
[147] Committee on the Elimination of Discrimination against Women, General Recommendation 19, art 6 (Eleventh session, 1992), UN Doc. A/47/38 at 1 (1992) ('General Recommendation 19').
[148] ibid, art 6.
[149] Committee on the Elimination of Discrimination against Women, General Recommendation 35, art 24 (b) (Sixty-eighth session, 2017), UN Doc. CEDAW/C/GC/35 (2017) ('General Recommendation 35').

of gender-based violence against women. Such failures or omissions constitute human rights violations'.[150]

QUESTION 1: Do States bear any positive obligation under the relevant provisions of international law to ensure that the rules and processes that regulate trade union formation, leadership elections, internal trade union governance, as well as collective bargaining and strikes (a) do not directly or indirectly discriminate against women; and/or (b) ensure the effective participation of women as trade union members and leaders; and/or (c) are free from gender-based violence?

a. Direct or indirect discrimination against women

States Parties to CEDAW are under a positive obligation to ensure that the rules and processes that regulate trade unions do not discriminate against women.

According to Article 7 of the Convention, States Parties to CEDAW are under a positive obligation to 'take all appropriate measures to eliminate discrimination against women in the political and public life of the country'.[151] General Recommendation 23 confirms that the political and public life of a country includes the 'activities of trade unions'.[152]
Although there is no specific mention of direct or indirect discrimination, given that this distinction is made in General Recommendation 28 (detailed above) it is assumed that States have an obligation to eliminate both direct and indirect discrimination in the activities of trade unions.

The 'activities of trade unions' are not defined. It is likely that trade union 'activities' extend to trade union formation, leadership elections and internal trade union governance. It is not clear whether they also extend to collective bargaining and strikes.

b. Effective participation of women as trade union members and leaders

States Parties to CEDAW are under a positive obligation to ensure the effective participation of women as trade union members and leaders.

General Recommendation 23 states that 'trade unions … have an obligation to demonstrate their commitment to the principle of gender equality in their constitution, in the application of those rules and in the composition of their membership with gender-balanced representation on their executive boards'.[153] States Parties to CEDAW are under a duty to ensure that trade

[150] ibid, art 24 (b).
[151] Convention (n 141), art 7.
[152] Committee on the Elimination of Discrimination against Women, General Recommendation 23, art 5 (Sixteenth session, 1997), UN Doc. A/52/38/Rev.1 at 61 (1997) ('General Recommendation 23).
[153] ibid, art 34.

unions comply with this obligation, given that 'trade unions … may not be subject directly to obligations under the Convention'.[154]

c. Gender-based violence

States Parties to CEDAW are under a positive obligation to ensure that trade unions are free from gender-based violence.

As stated above, General Recommendation 19 confirms that 'the definition of discrimination includes gender-based violence'.[155] As a result, it is assumed that the obligation under Article 7 of the Convention to 'take all appropriate measures to eliminate discrimination against women in the political and public life of the country', includes an obligation to eliminate gender-based violence in the activities of trade unions.

Thus, in response to the first research question, it has been demonstrated that States do bear a positive obligation under CEDAW to ensure that activities of trade unions do not discriminate against women. It is likely that trade union activities extend to trade union formation, leadership elections and internal trade union governance. It is not clear whether they also extend to collective bargaining and strikes. It has also been demonstrated that States bear a positive obligation under CEDAW to ensure the effective participation of women as trade union members and leaders. Further, it has been demonstrated that States bear a positive obligation under CEDAW to ensure that trade unions are free from gender-based violence.

QUESTION 2: Do the relevant rules of international law impose any positive obligations upon the State to prevent direct or indirect discrimination on the grounds of gender, sex, parental status or pregnancy and/or to prevent or address gender-based violence at work, including sexual harassment?

a. Direct or indirect discrimination on the grounds of gender, sex, parental status or pregnancy

States Parties to CEDAW are under a positive obligation to prevent discrimination on the grounds of gender, sex, parental status or pregnancy in the field of employment.

According to Article 11 (1) of the Convention, States Parties are under a positive obligation to 'take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights'.[156] Again, neither direct nor indirect discrimination are specifically mentioned, but given that this distinction is made in General Recommendation 28 (detailed above) it is assumed States have an obligation to eliminate both types of discrimination in the field of employment.

[154] General recommendation 23 (n 152), art 42.
[155] General recommendation 19 (n 147), art 6.
[156] Convention (n 141), art 11 (1).

Those rights that must be secured without direct or indirect discrimination on the basis of gender or sex include: '(a) the right to work as an inalienable right of all human beings; (b) the right to the same employment opportunities, including the application of the same criteria for election in matters of employment; (c) the right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training; (d) the right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work; (e) the right to social security, particularly in cases of retirement, unemployment, sickness invalidity and old age and other incapacity to work, as well as the right to paid leave; [and] (g) the right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction' must be secured without discrimination on the grounds of parental status or pregnancy'.[157] Further to Article 11 (1) (d) on the right to equal pay, General Recommendation 13 recommends that States Parties ratify the ILO Convention No 100, concerning Equal Remuneration for Men and Women Workers for Work of Equal Value.[158]

States Parties are also under an obligation to secure the right to work without direct or indirect discrimination on the grounds of parental status or pregnancy. According to Article 11 (2) of the Convention, States Parties are also under a positive obligation to 'take appropriate measures' to 'prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work'.[159] States Parties are under positive obligations to: '(a) prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status; (b) introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances; (c) encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities; (d) provide special protection to women during pregnancy in types of work proved to be harmful to them'.[160] As regards the right to maternity leave in Article 11 (2) (b), the Committee has confirmed that it should not be interpreted narrowly. In *de Blok et al v. The Netherlands,* the Committee rejected a narrow interpretation by the State which excluded self-employed women from protection under Article 11 (2) (b).[161] Consequently, the State was under an obligation to enact legislation to ensure all women workers' right to maternity leave.

[157] ibid, art 11(1)(g).
[158] Committee on the Elimination of Discrimination against Women, General Recommendation 13, art 1 (Eighth session, 1989), UN Doc. A/44/38 at 76 (1989).
[159] Convention (n 141), art 11 (2).
[160] ibid.
[161] Committee on the Elimination of Discrimination against Women, *de Blok et al v. The Netherlands* (Communication no. 36/2012) [8.4].

b. Gender-based violence at work, including sexual harassment

States Parties to CEDAW are under a positive obligation to prevent and address gender-based violence at work, including sexual harassment.

According to General Recommendation 19, 'equality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the workplace'.[162] The definition of sexual harassment 'includes such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment'.[163]

The case of *Belousova v. Kazakhstan* confirmed that the general positive obligations on States Parties under Article 2 (e) to protect and fulfil women's right to non-discrimination are engaged in situations of gender-based violence.[164] As a result, States Parties to CEDAW may be responsible for private acts should they fail to act with due diligence to prevent gender-based violence or to investigate and punish acts of violence, or fail to provide compensation.[165]

Hence, in response to the second research question, it has been demonstrated that States have a positive obligation under CEDAW to prevent discrimination against women in the field of employment on grounds of gender, sex, parental status or pregnancy. It has also been demonstrated that States have a positive obligation under CEDAW to prevent and address gender-based violence at work, including sexual harassment.

[162] General recommendation 19 (n 147), art 17.
[163] General recommendation 19 (n 147), art 18.
[164] Committee on the Elimination of Discrimination against Women, *Belousova v. Kazakhstan* (Communication no. 45/2012) [10.4].
[165] ibid.

III. International Covenant on Economic, Social and Cultural Rights (ICESCR)

QUESTION 1: Do States bear any positive obligation under the relevant provisions of international law to ensure that the rules and processes that regulate trade union formation, leadership elections, internal trade union governance, as well as collective bargaining and strikes (a) do not directly or indirectly discriminate against women; and/or (b) ensure the effective participation of women as trade union members and leaders; and/or (c) are free from gender-based violence?

As per Article 8(1)(a) of the International Covenant on Social, Economic and Cultural Rights (hereafter "Covenant"), State Parties must undertake to uphold the right of everyone to form trade unions and join the trade union of their choice. Pertinently, the provision goes on to state that: "no restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others."[166]

Article 8(1)(b) provides that State Parties should undertake to ensure: "The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations."

Further, Article 8(1)(d) recognizes: "(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country."

As per Article 3[167] of the Covenant, State Parties are obligated to ensure the equal rights of men and women to all the social, economic and cultural rights set forth in the Covenant. In General Comment 16 (hereafter "GC 16"), the Committee fleshed out the contours of this obligation. A few features of this GC are relevant for present purposes.

First, it held that Article 3 is a cross-cutting obligation which covers the rights set forth, inter alia, in Article 8 of the Covenant.[168]

It made the following observation about the application of the non-discrimination guarantee to the trade union provision: "Article 3 in relation to Article 8 requires allowing men and women to organize and join trade workers associations, that address their specific concerns. In this regard, particular attention should be given to domestic workers, rural women, women working in female-dominated industries and women working at home, who are often deprived of this

[166] It can be argued, in light of the reading of the Covenant on the whole, that gender-based restrictions are captured by the embargo on the imposition of any restrictions on this right. Other relevant provisions of the Covenant are spelt out below.

[167] Article 3 - "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant."

[168] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant), 11 August 2005, E/C.12/2005/4, available at: https://www.refworld.org/docid/43f3067ae.html [22].

right."[169] However, the observation relates only to the right to form and join trade unions, and not to the regulation of internal affairs of trade unions.

Second, GC 16 recognizes both direct and indirect discrimination. It defines direct discrimination as encompassing difference in treatment that is based directly and explicitly on sex or other masculine/feminine characters that does not have an objective justification. [170] It defines indirect discrimination as encompassing laws, programmes and policies that are not discriminatory on their face but operate in a discriminatory fashion in practice.[171] An example of indirect discrimination cited by the Committee is also relevant for present purposes. "Applying a gender-neutral law may leave the existing inequality in place, or exacerbate it."[172]

Third, GC 16 imposes the tripartite structure of State Parties having a duty to respect, protect and fulfill as regards every right. As regards the duty to respect, State Parties are obligated, as the case may be, to either not adopt or to repeal laws that either directly or indirectly discriminate against women.[173] As regards the duty to protect, a crucial obligation is that State Parties are obligated to prohibit discrimination of any kind; to adopt legislation to eliminate discrimination and to prevent third parties from interfering directly or indirectly with the enjoyment of this right; and to adopt programmes and set up institutions to enable women who have been discriminated against to obtain relief.[174] Finally, State Parties must ensure that non-state actors do not discriminate against men or women in the enjoyment of social, economic or cultural rights.[175]

When we apply the principles set out in the GC 16 to the questions at hand, the following picture emerges. First, the laws framed by State Parties as regards all dimensions of a trade union's operation must not discriminate, either directly or indirectly, against women. Second, State Parties must ensure that trade unions do not discriminate against women. Specifically, State Parties must ensure that the laws governing the functioning of these trade unions prohibit them from formulating their rules, bye-laws or other internal procedures that discriminate against women. Lastly, State Parties must put in place appropriate grievance redressal mechanisms for the benefit of women who have experienced any discriminatory treatment in the functioning of a trade union.

In General Comment 20 ("GC 20"), the Committee underscored the fact that 'everyone' is entitled to exercise the rights set forth in the Covenant, including freedoms related to trade union participation.[176]

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[169] ibid [25].
[170] ibid [12].
[171] ibid [13].
[172] ibid.
[173] GC 16 (n 168) [18].
[174] ibid [19].
[175] ibid [20].
[176] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), 2 July 2009, E/C.12/GC/20, available at: https://www.refworld.org/docid/4a60961f2.html [3].

GC 20 also calls on State Parties to set up institutions that can adjudicate complaints of discrimination in ways that are prompt, independent and impartial.[177] Pertinently, it makes specific mention in this context of the need to adjudicate on the conduct of private actors [which would include private trade unions] to the extent that it violates the nondiscrimination guarantee.[178] Such institutions must interpret the prohibition on discrimination in a way that ensures the full protection of Covenant Rights.[179]

Lastly, GC 23 notes how a majority of domestic workers are women and operate in deplorable, often slave-like conditions. Pertinently, it notes how they frequently do not have the right to join trade unions.[180]

In sum, General Comments 16, 20 and 23 issued by the ICESCR Committee referred to above speak directly to the issues raised in the question. They emphasize the importance of ensuring non-discriminatory access to the right to form trade unions and to strike. They also speak to the need for both public and private actors, which would include trade unions, to take steps to eliminate gender discrimination. Lastly, as mentioned above, discrimination has been understood by the Committee in very broad terms. On the basis of the principles set out in these General Comments, States bear an obligation to take steps to ensure that women from effectively participating in trade unions in their chosen capacity, subject to meeting the qualifying criteria.

QUESTION 2: Do the relevant rules of international law impose any positive obligations upon the State to prevent direct or indirect discrimination on the grounds of gender, sex, parental status or pregnancy and/or to prevent or address gender-based violence at work, including sexual harassment?

Article 2(2) of the Covenant undertakes to guarantee that the rights in the ICESCR would be guaranteed without any kind of discrimination based on the enumerated grounds or ‘other status’. Sex is one of the grounds listed in the Covenant.

As per Article 3 of the Covenant, State Parties are obligated to ensure the equal rights of men and women to all the social, economic and cultural rights set forth in the Covenant. (as explained in the previous section)

Article 10 of the Covenant states that mothers should be accorded special protection ‘during a reasonable period before and after childbirth’.

[177] ibid [40].
[178] ibid.
[179] ibid.
[180] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights), 7 April 2016, E/C.12/GC/23, available at: https://www.refworld.org/docid/5550a0b14.html [47(f)].

The Committee noted in GC 20 that the guarantee of non-discrimination is an immediate and cross-cutting obligation imposed in the Covenant.[181] It adopted a very capacious definition of discrimination. Discrimination is any distinction, exclusion, restriction or preference that is either directly or indirectly discriminatory.[182] It may either be based on discriminatory intent or produce a discriminatory effect. Further, public and private institutions should be required by State Parties to develop plans of action that address non-discrimination.[183]

In GC 20, the Committee noted that prohibition of sex-based discrimination in the Covenant is no longer just confined to physiological characteristics. Rather, it also covers gender stereotypes, prejudices and the notion of gender roles.[184] The Committee gives three pertinent examples of the latter. (a): refusal to hire a woman on the basis that she might become pregnant. (b): allocating low-level or part-time jobs to women, on the noxious assumption that they might be unable/unwilling to devote as much time to their work as their male counterparts, (c) refusal to grant paternity leave to fathers which would be indirectly discriminatory against them.[185]

In GC 20, the Committee clarified, the prohibition on discrimination also includes within its ambit harassment.[186] In General Comment 23 ("GC 23"), the Committee states that all workers should be free from sexual harassment.[187] The GC goes on to make the following pertinent recommendations:

i.
ii. Harassment should be defined capaciously by national laws such as those dealing with discrimination and the penal code.
iii. Sexual harassment should be separately defined and criminalized.
iv. A national policy against harassment should cover the following crucial elements. (a) outlawing acts that constitute sexual harassment; (b) delineating duties of employers, supervisors, managers, etc., to prevent and offer remedies to victims of harassment; (c) access to justice, including free legal aid; (d) protection of victims and outlawing any reprisals against them; (e) developing a clear procedure for notifying central public authorities against sexual harassment; (f) compulsory training for managers and supervisors to negotiate these issues; and (g) provision for a clearly visible workplace-specific policy.[188]
v.

In conclusion, the Covenant (read with the principles set out in GC 20 and GC 23) imposes positive obligations on States to: (a) prohibit discrimination based on gender/sex, pregnancy and parentage; and (b) obligates them to take measures against sexual harassment at the workplace.

[181] GC 20 (n 176) [7].
[182] ibid.
[183] ibid [38].
[184] ibid [20].
[185] ibid.
[186] ibid [7].
[187] GC 23 (n 180) [48].
[188] ibid.

IV. European Convention on Human Rights (ECHR)

QUESTION 1: Do States bear any positive obligation under the relevant provisions of international law to ensure that the rules and processes that regulate trade union formation, leadership elections, internal trade union governance, as well as collective bargaining and strikes (a) do not directly or indirectly discriminate against women; and/or (b) ensure the effective participation of women as trade union members and leaders; and/or (c) are free from gender-based violence?

There has been no direct consideration of these issues by the European Court of Human Rights (ECtHR). This section therefore outlines the scope of trade union rights and freedoms under the ECHR and the Court's jurisprudence developing these rights and freedoms. It then considers the mechanisms by which the Court might, in appropriate case, adopt a gender perspective with respect to trade union rights.

a. Relevant provisions

Article 11(1) of the ECHR expressly recognises the right to form and join trade unions: *Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*

Article 11(2) limits restrictions on trade union rights, as follows: *No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.*

The article 11 right to form and to join trade unions for the protection of one's interests is a right 'set forth in the Convention', and it therefore attracts a number of related obligations.

First, Article 1 of the ECHR requires States to 'secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'. It imposes on States a *positive* obligation to guarantee respect for the trade union rights protected by article 11, as well as a *negative* obligation to refrain from interfering with those rights.[189]

Second, article 13 of the ECHR provides that everyone 'whose rights and freedoms set forth in this Convention are violated shall have an effective remedy before a national authority…'.

[189] *Ilasçu v Moldova* ECHR 2004-VII 1 [322].

Thus, even when the State is not initially responsible for the violation of a protected trade union right, it may become responsible under article 13 if it fails to take the positive steps of investigating and remedying violations of Article 11 rights.

Third, and most relevantly for present purposes, article 14 prohibits discrimination, including on grounds of sex, in the securing of Convention rights. Article 14 imports both positive and negative obligations (see below). Therefore, article 14 read in conjunction with article 11 requires States to refrain from discriminating against persons on grounds of gender with respect to enjoyment of their article 11 trade union rights. Significantly, it also requires the State to take positive steps to secure the article 11 rights equally to all persons, irrespective of gender. These positive obligations include actively ensuring that past discrimination in trade union rights or discriminatory practices within trade unions, disguised in allegedly neutral criteria or rules, are not perpetuated.[190]

b. The scope of ECHR trade union rights

One of the first judgments to elaborate on the scope of the rights protected by article 11 was the ECtHR's 1975 judgment in *National Union of Belgian Police v Belgium*.[191] The case concerned the obligation of public authorities, in their capacity as employers, to consult with trade unions. First, the ECtHR noted that while article 11(1) presents trade union freedom as one form or a special aspect of freedom of association, the article 'does not guarantee any particular treatment of trade unions, or their members, by the State, such as the right to be consulted by it.'[192] Secondly, however, the Court emphasised that the words 'for the protection of his interests' in article 11(1) are not redundant. It held that these words clearly denote purpose, and that they show that the Convention 'safeguards freedom to protect the occupational interests of trade union members by trade union action, the conduct and development of which the Contracting States must both permit and make possible.'[193] Significantly, this reasoning indicates that States must both permit (i.e. not interfere with) trade union action and also take positive steps to enable trade union action. Thus, there was no violation of article 11 in this case. Nonetheless, the case represents an important development of the scope of article 11 rights. The Court makes clear that article 11 safeguards: the right to form a trade union and to join the trade union of one's choice; the right to be heard and the freedom to protect the occupational interests of members by trade union action, the conduct and development of which States must both permit and enable.

In *Wilson v United Kingdom*, the Court developed its reasoning on the positive obligations inherent in article 11. The applicants submitted that the law in the UK, by allowing the employer to de-recognise trade unions, failed to ensure their rights to protect their interests

[190] See *JD v United Kingdom* App nos 32949/17 and 34614/17 (ECtHR, 24 October 2019) [84]; *Horváth v Hungary* App no 11146/11 (ECtHR, 29 January 2013).
[191] *National Union of Belgian Police v Belgium* App no 4464/70 (ECtHR, 27 October 1975).
[192] ibid [38].
[193] ibid [39].

through trade union membership, contrary to article 11.[194] In addition, the individual applicants complained that UK law permitted discrimination by employers against trade union members, contrary to article 14 of the ECHR taken in conjunction with article 11. They complained in particular that the requirement to sign a personal contract and lose union rights, or else accept a lower pay rise, was contrary to article 11. The Court held that the union and its members must be free, in one way or another, to seek to persuade the employer to listen to what it has to say on behalf of its members, and noted that the right to strike represents 'one of the most important of the means by which the State may secure a trade union's freedom to protect its members' occupational interests'.[195] The ECtHR held that it is the essence of the right to join a trade union for the protection of their interests that employees should be free to instruct or permit the union to make representations to their employer or to take action in support of their interests on their behalf. If workers are prevented from so doing, their freedom to belong to a trade union, for the protection of their interests, becomes illusory. It is thus 'the role of the State to ensure that trade union members are not prevented or restrained from using their union to represent them in attempts to regulate their relations with their employers'.[196]

Further modern development of trade union rights under article 11 occurred in *Demir v Turkey*.[197] The applicants, municipal civil servants, complained that in breach of article 11 the domestic courts had denied them, firstly, the right to form trade unions and, secondly, the right to engage in collective bargaining and enter into collective agreements.[198] As it had done in *Wilson v United Kingdom*, the Court made extensive use of ILO Conventions and ILO committees' observations, referring in addition to article 22 of the ICCPR and article 8 of the ICESCR.[199] The Court reiterated that article 11 is binding upon the 'State as employer' as well as on the 'State as holder of public power', and that it imposes positive obligations on the State to take reasonable and appropriate measures to secure the rights of an applicant under article 11. The result of *Demir v Turkey* is that the right to bargain collectively is now understood as one of the essential elements enshrined within article 11, not to be restricted except as permitted under article 11(2). The evolution in the Court's treatment of collective bargaining from *Swedish Engine Drivers' Union v Sweden*, to *Wilson v United Kingdom*, to *Demir v Turkey*, illustrates the dynamic interpretation of article 11 to take account of evolving labour relations, ILO instruments, and other European and international law developments.

i. Specific trade union rights under article 11

Rights of **trade union formation** are clearly protected by article 11. A number of cases have confirmed that these rights extend also to members of the administration of the State and to

[194] *Wilson v United Kingdom* App nos 30668/96, 30671/96 and 30678/96 (ECtHR, 2 July 2002) [3].
[195] ibid [44]–[45].
[196] ibid [46].
[197] *Demir v Turkey* ECHR 2008-V 333.
[198] ibid [3].
[199] ibid [32]–[44].

members of the armed forces, to be subject only to such restrictions as are permitted by article 11(2).[200]

As to **internal trade union governance**, it is also clear that the right to form trade unions under article 11 involves 'the right of trade unions to draw up their own rules and to administer their own affairs'.[201] In *Associated Society of Locomotive Engineers & Firemen v United Kingdom*, the ECtHR held that: *The right to form trade unions involves, for example, the right of trade unions to draw up their own rules and to administer their own affairs. Such trade union rights are explicitly recognised in Articles 3 and 5 of ILO Convention No 87, the provisions of which have been taken into account by the Convention organs in previous cases. Prima facie trade unions enjoy the freedom to set up their own rules concerning conditions of membership, including administrative formalities and payment of fees, as well as other more substantive criteria, such as the profession or trade exercised by the would-be member*.[202] This illustrates a key challenge: that of the intersection between trade union formation over its own affairs and the principle of non-discrimination.

The evolution of the **right to collective bargaining** was considered above.[203]

The **right to strike** was described in *Wilson v United Kingdom* as 'one of the most important of the means by which the State may secure a trade union's freedom to protect its members' occupational interests'.[204] In that case, the ECtHR held that: *The essence of a voluntary system of collective bargaining is that it must be possible for a trade union which is not recognised by an employer to take steps including, if necessary, organising industrial action, with a view to persuading the employer to enter into collective bargaining with it on those issues which the union believes are important for its members' interests.*[205]

Further consideration of the right to strike occurred in *National Union of Rail, Maritime and Transport Workers v United Kingdom*, where the applicant trade union contested a specific limitation on the statutory protection of strike action, submitting that the ban on secondary strike action (or so-called 'sympathy' strikes) was inconsistent with article 11.[206] The Court held that the interference with the applicant trade union's rights by means of the secondary strike ban satisfied the conditions under article 11(2), in that it was 'prescribed by law', pursued a legitimate aim, and was 'necessary in a democratic society' to achieve that aim. However, the case nonetheless demonstrates that the right to strike, including the right to take secondary strike action, is now understood as a protected right under article 11(1). Indeed, in *Enerji Yapi-*

[200] *Demir* (n 197); *Matelly v France* App no 10609/10 (ECtHR, 2 October 2014); *ADEFDROMIL v France* App no 32191/09 (ECtHR, 2 October 2014).
[201] *Johansson v Sweden* App no 13537/88 (European Commission of Human Rights, 7 May 1990).
[202] *Associated Society of Locomotive Engineers & Firemen v United Kingdom* App no 11002/05 (ECtHR, 27 February 2007) [38].
[203] See in this regard also *Unite the Union v United Kingdom* App no 65397/13 (ECtHR, 26 May 2016), where the ECtHR found that the right to collective bargaining does not extend to a positive obligation to provide a mandatory statutory mechanism for collective bargaining in the agricultural sector.
[204] *Wilson* (n 194) [44]–[45].
[205] ibid [46].
[206] *National Union of Rail, Maritime and Transport Workers v United Kingdom* ECHR 2014-II 1 [7].

Yol Sen v Turkey, the Court described the right to strike as an 'indispensable corollary' of the right to organise under article 11(1).[207]

c. Applying a gender perspective to ECHR trade union rights

It does not appear that the ECtHR has directly considered trade union rights under article 11 from a gender perspective, either in the context of the prohibition of gender-based discrimination specifically or more generally in the light of gender equality. However, as noted, a corollary of reading article 14 with article 11 is that all of the trade union rights considered above must be secured equally to all persons within the State's jurisdiction, without discrimination as to gender, and that this may require the State to take *positive* steps to remedy discriminatory practices within trade unions.

In *Zhdanov v Russia*, the ECtHR recently reiterated the State's positive obligation under article 11 to secure the effective enjoyment of the right to freedom of association and then noted, by reference to articles 11 and 14, that: *The positive obligation to secure the effective enjoyment of the right to freedom of association and assembly is of particular importance for persons holding unpopular views or belonging to minorities, because they are more vulnerable to victimisation.*[208]

This case did not concern trade union rights specifically, but the reasoning illustrates the way in which articles 11 and 14 interact to produce positive obligations on the State to secure freedom of association, including trade union rights, to all persons free of discrimination, including gender-based discrimination, and taking into account persons and groups vulnerable to victimisation.

To similar effect, the ECtHR reasoned in *Identoba v Georgia* that: *The State must act as the ultimate guarantor of the principles of pluralism, tolerance and broadmindedness. Genuine, effective freedom of peaceful assembly cannot, therefore, be reduced to a mere duty on the part of the State not to interfere: a purely negative conception would not be compatible with the object and purpose of Article 11 of the Convention. This provision sometimes requires positive measures to be taken, even in the sphere of relations between individuals, if need be. That positive obligation is of particular importance for persons holding unpopular views or belonging to minorities, because they are more vulnerable to victimisation.*[209]

Further, in *Associated Society of Locomotive Engineers & Firemen v United Kingdom*, which did concern trade union rights, the Court held: *Pluralism, tolerance and broadmindedness are hallmarks of a 'democratic society'. Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position. For the individual right to join a*

[207] *Enerji Yapi-Yol Sen v Turkey* App no 68959/01 (ECtHR, 21 April 2009) [24].
[208] *Zhdanov v Russia* App nos 12200/08, 35949/11 and 58282/12 (ECtHR, 16 July 2019).
[209] *Identoba v Georgia* App no 73235/12 (ECtHR, 12 May 2015) [94].

union to be effective, the State must nonetheless protect the individual against any abuse of a dominant position by trade unions. Such abuse might occur, for example, where exclusion or expulsion from a trade union was not in accordance with union rules or where the rules were wholly unreasonable or arbitrary or where the consequences of exclusion or expulsion resulted in exceptional hardship.[210] While this reasoning did not concern gender specifically, it again illustrates the positive obligations incumbent on a State to protect the individual against 'any abuse of a dominant position by trade unions'. The ECtHR has not yet had the opportunity to comment on the extent of States' positive obligations in relation to gender equality within trade unions.

QUESTION 2: Do the relevant rules of international law impose any positive obligations upon the State to prevent direct or indirect discrimination on the grounds of gender, sex, parental status or pregnancy and/or to prevent or address gender-based violence at work, including sexual harassment?

This section addresses States' positive obligations to prevent direct and indirect discrimination on the grounds of gender, sex, parental status, or pregnancy.

a. Relevant provisions

Article 14 of the ECHR prohibits discrimination in relation to Convention rights. It provides: *The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*

This is not an independent prohibition of discrimination. Rather, complaints of discrimination must fall 'within the ambit' of one of the other rights protected by the Convention.[211] However, when applying article 14, the ECtHR has made clear that it may examine claims under article 14 'taken in conjunction with' a substantive right, even in the absence of a violation of that substantive right.[212] Further, in *AH v Russia*, the ECtHR held that it was possible for a complaint of discrimination to fall within the ambit of a particular right, even if it did not relate to a specific entitlement guaranteed under the Convention – it was sufficient that the facts of the case broadly related to issues that were protected under the ECHR.[213]

The prohibition in article 14 was reinforced and expanded by Protocol No 12 to the ECHR, article 1 of which provides:

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[210] *Associated Society of Locomotive Engineers & Firemen* (n 202) [43].
[211] *Abdulaziz v United Kingdom* (1985) Series A no 94 [71]; *Karlheinz Schmidt v Germany* (1994) Series A no 291-B [22]; *Khamtokhu v Russia* App nos 60367/08 and 961/11 (ECtHR, 24 January 2017) [53].
[212] *Sommerfeld v Germany* ECHR 2003-VIII 137 [84]; European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Non-Discrimination Law* (Publications Office of the European Union 2018) (ECtHR/FRA Handbook) 30–32; R Wintermute, '"Within the Ambit": How Big is the "Gap" in Article 14 European Convention on Human Rights?' (2004) 4 EHRLR 366.
[213] *AH v Russia* App no 6033/13 (ECtHR, 17 January 2017) [376], [380]; ECtHR/FRA Handbook (n 212) 30.

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.[214]

This article provides a more all-encompassing prohibition of discrimination, which is extended to any right set forth by law and to discrimination by public authorities. Under Protocol No 12, the prohibition of discrimination thus became a free-standing right, rather than contingent on the engagement of another Convention right.[215] The Explanatory Report for Protocol No 12 states that the additional scope of protection under article 1 (as compared to article 14 of the Convention) relates to discrimination:

(i) in the enjoyment of any right specifically granted to an individual under national law;
(ii) in the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner;
(iii) by a public authority in the exercise of discretionary power (for example, granting certain subsidies);
(iv) by any other act or omission by a public authority (for example, the behaviour of law enforcement officers when controlling a riot).[216]

The concept of discrimination is to be interpreted in the same manner under both article 14 of the ECHR and article 1 of Protocol No 12.[217]

b. Positive obligations to prevent gender-based discrimination

Article 14 of the ECHR and Article 1 of Protocol No 12 not only import a negative obligation not to discriminate against persons on the ground of their gender, but also import positive obligations to prevent discrimination and to secure rights to persons without discrimination.

Article 1 of the ECHR provides: *The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.*

It follows from Article 1 that States have positive obligations to 'secure' or 'guarantee' the Convention rights to persons within their jurisdiction. Where the ECtHR establishes that the facts of the case are within the respondent State's jurisdiction, that State has two main

[214] Protocol No 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 2000, entered into force 1 April 2005) ETS 177.
[215] See *Sejdić v Bosnia and Herzegovina* ECHR 2009-VI 273 [53].
[216] Explanatory Report to the Protocol No 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 2000) ETS 177 [22].
[217] *Sejdić* (n 215) [55]; *Pilav v Bosnia and Herzegovina* App no 41939/07 (ECtHR, 9 June 2016) [40].

obligations: a negative obligation to refrain from actions incompatible with the Convention; and a positive obligation to guarantee respect for the rights and freedoms defined in the Convention.[218]

In determining the scope of a State's positive obligations, the Court will have regard to 'the fair balance that has to be struck between the general interest and the interests of the individual, the diversity of situations obtaining in Contracting States and the choices which must be made in terms of priorities and resources'.[219] The Court will not interpret positive obligations in such a way as to impose an impossible or disproportionate burden.[220]

Specifically, under article 14, States must *refrain* from subjecting persons or groups to different treatment where such treatment would qualify as discriminatory. However, as the Court recently explained in *JD v United Kingdom*, this is not the only facet of the prohibition of discrimination in article 14: *The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States, without an objective and reasonable justification, fail to treat differently persons whose situations are significantly different. The prohibition deriving from Article 14 will therefore also give rise to positive obligations for the Contracting States to make necessary distinctions between persons or groups whose circumstances are relevantly and significantly different.*[221]

Similarly, in *MC v Romania*, the Court emphasised the respondent State's positive responsibilities under article 14 of the Convention to secure the fundamental values protected by articles 3 and 8 without discrimination.[222] Fulfilling positive obligations under article 14 may require taking specific positive steps to avoid the perpetuation of past discrimination or discriminatory practices disguised in allegedly neutral criteria or rules.[223]

c. Discrimination categories

i. Direct discrimination

Article 14 does not prescribe a test of discrimination. However, it is the ECtHR's established case-law that in order for an issue to arise under article 14 there must be a difference in the treatment of individuals in analogous, or relevantly similar, situations, which is based on an identifiable characteristic.[224] Direct discrimination can also arise from treating two people in different situations in the same way; the Court stated in *Thlimmenos v Greece* that: *[T]he right not to be discriminated against in the enjoyment of the rights guaranteed under the ECHR is*

[218] *Ilasçu* (n 189) [322].
[219] ibid [332].
[220] *Özgür Gündem v Turkey* ECHR 2000-III [43].
[221] *JD* (n 190) [84]. See also, *Thlimmenos v Greece* ECHR 2000-IV 263 [44]; *Runkee v United Kingdom* App nos 42949/98 and 53134/99 (ECtHR, 10 May 2007) [35]; *DH v Czech Republic* ECHR 2007-IV 241 [175]; *Eweida v United Kingdom* App no 48420/10 (ECtHR, 15 January 2013); *Kurić v Slovenia* ECHR 2012-IV 1 [288].
[222] *MC v Romania* App no 12060/12 (ECtHR, 12 April 2016) [105].
[223] Compare *Horváth v Hungary* (n 190); ECtHR/FRA Handbook (n 212) 77.
[224] *AH* (n 213) [407]; *Biao v Denmark* App no 38590/10 (ECtHR, 24 May 2016) [89]; *Khamtokhu* (n 211) [64].

also violated when States […] fail to treat differently persons whose situations are significantly different.[225]

Such treatment is discriminatory if it has no 'objective and reasonable justification'; in other words, if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'.[226] States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment, however the scope of this margin will vary according to the circumstances, the subject matter and the background.[227] The Court has reiterated in numerous cases that the advancement of gender equality is today a major goal in the Member States of the Council of Europe and 'very weighty reasons' must therefore be put forward before a gender-based difference of treatment could be regarded as compatible with the Convention; in particular, references to traditions, general assumptions or prevailing social attitudes in a particular country are insufficient justification for a difference in treatment on grounds of sex.[228]

As to the burden of proof in this sphere, the Court has held that once the applicant has demonstrated a relevant difference in treatment, the onus is then on the respondent State to demonstrate that this difference was justifiable under the Convention.[229]

ii. Indirect discrimination

The ECtHR has drawn on the definition of indirect discrimination in European Union law, stating in *Biao v Denmark* that: *A difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group.*[230]

In *Di Trizio v Switzerland*, the Court explained that as far as allegations of indirect discrimination are concerned, the applicant must adduce evidence of disproportionately harmful effects on a particular group, which then gives rise to a presumption of indirect discrimination; it is for the respondent State to rebut that presumption by showing that the difference in treatment was the result of objective factors unrelated to the factor indicated by the applicant.[231] In that case, the Court relied on statistics showing that 97% of persons affected by the State's method of calculating disability benefits were women who wished to lower their working hours after the birth of a child. The Court found that this method, which disadvantaged women who reduced their working hours after childbirth, amounted to discrimination.

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[225] *Thlimmenos* (n 221) [44].
[226] ibid; *Sejdić* (n 215) [42].
[227] *AH* (n 213) [407]; *Sejdić* (n 215) [42].
[228] *Di Trizio v Switzerland* App no 7186/09 (ECtHR, 2 February 2016) [82]; *Konstantin Markin v Russia* ECHR 2012-III 1 [127]; *Burghartz v Switzerland* (1994) Series A no 280-B [27]; *Schuler-Zgraggen v Switzerland* (1993) Series A no 263 [63].
[229] *Khamtokhu* (n 211) [65]; *Di Trizio* (n 228) [84].
[230] *Biao v Denmark* (n 224) [103]; see also *DH* (n 221) [184].
[231] *Di Trizio* (n 228) [84]; *DH* (n 221) [188]; *Oršus v Croatia* ECHR 2010-II 247 [152].

To similar effect, in its decision in *Hoogendijk v The Netherlands*, the Court held: *[W]here an applicant is able to show, on the basis of undisputed official statistics, the existence of a prima facie indication that a specific rule – although formulated in a neutral manner – in fact affects a clearly higher percentage of women than men, it is for the respondent Government to show that this is the result of objective factors unrelated to any discrimination on grounds of sex. If the onus of demonstrating that a difference in impact for men and women is not in practice discriminatory does not shift to the respondent Government, it will be in practice extremely difficult for applicants to prove indirect discrimination.*[232]

d. Protected grounds

i. Gender/ sex

An important area of gender equality in the ECtHR's jurisprudence concerns cases where women are victims of violence; the ECtHR has held that gender-based violence is a form of discrimination against women in violation of articles 2 and 3 in conjunction with article 14 of the ECHR.[233]

The principle of gender equality has also been applied to find prohibited sex discrimination in the context of employment and parental leave. For example, in *Emel Boyraz v Turkey*, the applicant was dismissed from her post as a security officer on the grounds that the tasks of security officers involved risks and responsibilities that women were unable to assume, such as working at night in rural areas and using firearms and physical force.[234] The ECtHR considered that the complaint should be examined under article 14 of the ECHR, taken in conjunction with article 8: *In the Court's view, the concept of 'private life' [in article 8] extends to aspects relating to personal identity and a person's sex is an inherent part of his or her identity. Thus, a measure as drastic as a dismissal from a post on the sole ground of sex has adverse effects on a person's identity, self-perception and self-respect and, as a result, his or her private life. The Court therefore considers that the applicant's dismissal on the sole ground of her sex constituted an interference with her right to respect for her private life. What is more, the applicant's dismissal affected a wide range of her relationships with other people, including those of a professional nature and her ability to practise a profession which corresponded to her qualifications [the Court having found in earlier cases that professional relationships and practising a profession fall within article 8]. Thus, the Court considers that Article 8 is applicable to the applicant's complaint.*[235]

The ECtHR found that the authorities had not provided sufficient justification to explain the alleged inability of women to work as security officers in contrast to men. The Court also

[232] *Hoogendijk v The Netherlands* App no 58641/00 (ECtHR, 6 January 2005).
[233] See, eg, *Opuz v Turkey* ECHR 2009-III 107; *Halime Kiliç v Turkey* App no 63034/11 (ECtHR, 28 June 2016); *MG v Turkey* App no 646/10 (ECtHR, 22 March 2016).
[234] *Emel Boyraz v Turkey* App no 61960/08 (ECtHR, 2 December 2014).
[235] ibid [44].

pointed to the fact that the applicant had been working as a security officer for four years, and there were no indications that she had failed to fulfil her duties because of her sex. Consequently, there had been a violation of article 14.

In *Konstantin Markin v Russia*, the applicant complained that male military personnel (unlike female personnel) were not entitled to three years' parental leave to take care of minor children, alleging that this difference in treatment was discriminatory on the grounds of sex.[236] The ECtHR referred to ILO Convention No. 111, article 1 of which defines discrimination as including, relevantly, any distinction, exclusion or preference made on the basis of sex which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. The Court also noted that article 3(1) of ILO Convention No. 156 requires parties to make it an aim of national policy to enable persons with family responsibilities who are engaged or wish to engage in employment to exercise their right to do so without being subject to discrimination and, to the extent possible, without conflict between their employment and family responsibilities. As to whether the case fell 'within the ambit' of article 8, the Court emphasised that although article 8 does not include a right to parental leave or impose any positive obligation on States to provide parental leave allowances, parental leave and related allowances do promote family life and necessarily affect the way in which it is organised, and therefore come within the scope of article 8.[237] The Court held that men were in an analogous situation to women regarding parental leave, and rejected the Russian Government's arguments that the difference in treatment was justified by the 'traditional distribution of gender roles in society' and that parental leave for male personnel would have a negative effect on the military's operational effectiveness. It commented that 'contemporary European societies have moved towards a more equal sharing between men and women of responsibility for the upbringing of their children and men's caring role has gained recognition'.[238] The Court agreed with the applicant's submission that the different treatment in this case had the effect of 'perpetuating gender stereotypes' of women as primary child-carers and men as primary breadwinners and was 'disadvantageous both to women's careers and to men's family life'.[239] Accordingly, the Court found that there had been a violation of article 14 in conjunction with article 8 of the ECHR.

In another example of employment-related sex discrimination, in *Ünal Tekeli v Turkey*, the applicant alleged that the domestic courts' refusal to allow her to bear only her maiden name for the purposes of her employment as a lawyer unjustifiably interfered with her right to protection of her private life (article 8) and discriminated against her as a woman, in that only married men could continue to bear their own family name after marriage (article 14, read in conjunction with article 8).[240] The Court emphasised the 'very weighty reasons' threshold for justifying a difference of treatment based on the ground of sex alone.[241] The respondent State

[236] *Konstantin Markin* (n 228) [3], [12]–[15].
[237] ibid [130].
[238] ibid [140].
[239] ibid [141].
[240] *Ünal Tekeli v Turkey* ECHR 2004-X 213 [3].
[241] ibid [53].

argued that the interference in question pursued the legitimate aim of reflecting family unity through the husband's surname and thereby ensuring public order. The Court rejected this justification, referring to the advancement of gender equality in Council of Europe States as well as the position under international law. While accepting that there may be some inconvenience associated with a change in the system, the Court considered in this instance that society might 'reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the name they have chosen'.[242] Accordingly, it found a violation of article 14, taken in conjunction with article 8.

ii. Parental status/ pregnancy

The list of protected grounds set out in article 14 is illustrative and not exhaustive, as is shown by the words 'any ground such as' and the inclusion in the list of the phrase 'any other status'.[243]

In *Khamtokhu v Russia*, the Court noted that the words 'other status' have generally been given a wide meaning, and that their interpretation has not been limited to characteristics which are personal in the sense that they are innate or inherent.[244] The ECtHR has recognised that characteristics including fatherhood,[245] marital status,[246] parenthood of a child born out of wedlock,[247] and health or any medical condition[248] are included as protected grounds falling under 'other status'.

As to parental status, in *Weller v Hungary*, the applicants maintained that, when claiming maternity benefit, they had suffered discrimination because of the first applicant's parental status.[249] They relied on article 14, read in conjunction with article 8. The Court reiterated that, while differences may exist between mother and father in their relationship with the child, both parents are 'similarly placed in taking care of the unborn child', and noted that the first applicant was 'differently treated on the grounds of his parental status compared with other persons who are similarly responsible for bringing up newborn children'.[250] The Court therefore found that 'parental status' was a protected ground under article 14 and that this article, read with article 8, had been violated.

As to pregnancy, the Court has as yet not expressly held that pregnancy falls within 'any other status'.

[242] ibid [67].
[243] *Khamtokhu* (n 211) [61].
[244] ibid.
[245] *Weller v Hungary* App no 44399/05 (ECtHR, 31 March 2009).
[246] *Petrov v Bulgaria* App no 15197/02 (ECtHR, 22 May 2008).
[247] *Sommerfeld* (n 212); *Sahin v Germany* ECHR 2003-VIII 63.
[248] *Novruk v Russia* App no 31039/11 (ECtHR, 15 March 2016).
[249] *Weller* (n 245).
[250] ibid [33].

e. Gender-based violence at work

In *Opuz v Turkey*, the ECtHR emphasised that: [*T]he issue of domestic violence, which can take various forms ranging from physical to psychological violence or verbal abuse … is a general problem which concerns all Member States and which does not always surface since it often takes place within personal relationships or closed circuits.*[251]

In that case, and in others, the Court has determined that gender-based violence constitutes one form of prohibited discrimination against women, contrary to article 14.[252] Gender-based violence frequently also engages other ECHR articles, including article 2 (right to life) and article 3 (prohibition of inhuman or degrading treatment).[253] The Court has stated that treating violence and brutality arising from discriminatory attitudes towards women on an equal footing with violence where there were no such overtones would be turning a blind eye to the specific nature of acts that were particularly destructive of fundamental rights.[254] It has also emphasised that, while the choice of appropriate means of deterring gender-based violence is in principle within States' margin of appreciation, effective deterrence against serious acts of gender-based violence requires efficient and effective criminal law provisions.[255]

States have a positive duty to *prevent* gender-based violence on the part of private individuals of which the authorities had, or ought to have had, knowledge.[256] In addition, the ECtHR held in *Abdu v Bulgaria* that States have a positive obligation to *investigate* the existence of any possible discriminatory motive behind an act of violence, and that overlooking the bias motivation behind a crime amounted to a violation of article 14.[257] As the ECtHR and European Union Agency for Fundamental Rights point out in their jointly-authored handbook on non-discrimination law in Europe, the ECtHR's approach to positive obligations incumbent on States in relation to the conduct of private individuals has the effect of extending the protection offered by the ECHR to persons who are victims of gender-based violence *regardless* of whether that abuse is perpetrated by State agents or third parties.[258]

The ECtHR's jurisprudence in this area is applicable to gender-based violence occurring within trade unions and at work, via the mechanism of articles 8 and 11 read in conjunction with article 14. Article 8 has been interpreted as covering the sphere of employment, because it protects a person's ability to 'develop relationships with the outside world' and to 'earn their living', including in the context of access to a profession or trade.[259]

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[251] *Opuz* (n 233) [132].
[252] See, *Eremia v Moldova* App no 3564/11 (ECtHR, 28 May 2013); *MG* (n 233); *Halime Kiliç v Turkey* (n 233).
[253] See, *Kontrovà v Slovakia* App no 7510/04 (ECtHR, 31 May 2007); *Branko Tomašić v Croatia* App no 46598/06 (ECtHR, 15 January 2009); *Durmaz v Turkey* App no 3621/07 (ECtHR, 13 November 2014).
[254] *MC* (n 222) [113]; see also ECtHR/FRA Handbook (n 212) 82.
[255] ECtHR/FRA Handbook (n 212) 82.
[256] ibid 82–84.
[257] *Abdu v Bulgaria* App no 26827/08 (ECtHR, 11 March 2014); ECtHR/FRA Handbook (n 212) 82–83.
[258] ECtHR/FRA Handbook (n 212) 83; see also *RB v Hungary* App no 64602/12 (ECtHR, 12 April 2016) [39].
[259] *Sidabras v Lithuania* ECHR 2004-VIII 367 [48]; see also *Bigaeva v Greece* App no 26713/05 (ECtHR, 28 May 2009); *IB v Greece* ECHR 2013-V 81.

In addition to articles 8 and 11, gender-based violence at work may also engage other ECHR articles, such as articles 2 and 3. For example, in *BV v Belgium*, the applicant alleged that she had been raped twice and indecently assaulted once by X, a work colleague, between 1996 and 1998.[260] After learning by chance ithat no further action was to be taken on her complaint with the gendarmarie, the applicant took multiple steps to attempt to induce the authorities to investigate. Some seven years later, the investigation having been delayed at various junctures, a court dismissed a case in relation to the complaint, for insufficient evidence (noting, in so doing, that there had been unreasonable delay on the part of the investigating authorities). The ECtHR found that article 3 of the ECHR had required the Belgian authorities to carry out an effective investigation, and in view of this positive obligation, they should have made prompt use of all available opportunities to establish the facts and circumstances surrounding the alleged acts. The Court concluded, unanimously, that there had been a violation of the positive procedural obligation inherent in article 3.

As to sexual harassment at work, while the ECHR does not contain a specific prohibition of harassment, it does contain particular rights that relate to the same area. Sexual harassment at work may fall under the right to respect for private and family life (protected under article 8 of the ECHR), or the right to be free from inhuman or degrading treatment or punishment under article 3. Where acts of harassment display a discriminatory motive, the ECtHR may examine the alleged breaches of the relevant ECHR articles in conjunction with article 14. An example of harassment being treated as coming within the ambit of ECHR provisions (although not in the employment context) is seen in *Dordević v Croatia*,[261] where one of the applicants was the mother of a mentally and physically disabled man, who complained that the authorities had failed to protect her from harassment perpetrated by children in her neighbourhood. The ECtHR stressed that the continued harassment of the applicant mother's son, of whom she was taking care, along with incidents which concerned her personally, had negatively affected her private and family life. By failing to address properly the acts of harassment or to put in place any relevant measures to prevent further harassment of the applicant and her son, the authorities had failed to protect the applicant's right to respect for private and family life, in breach of article 8 of the ECHR.[262]

[260] *BV v Belgium* App no 61030/08 (ECtHR, 2 May 2017).
[261] *Dordević v Croatia* ECHR 2012-V 1.
[262] For further examples of harassment treated as falling within the scope of ECHR provisions, see: ECtHR/FRA Handbook (n 212) 67–69.

V. European Union

QUESTION 1: Do States bear any positive obligation under the relevant provisions of international law to ensure that the rules and processes that regulate trade union formation, leadership elections, internal trade union governance, as well as collective bargaining and strikes (a) do not directly or indirectly discriminate against women; and/or (b) ensure the effective participation of women as trade union members and leaders; and/or (c) are free from gender-based violence?

The European Union (EU) legal regime has several components. At the apex are its treaties which ground the agreement between the Member States of the institution and set out the competencies and objectives of the Union – they create binding obligations. The regime also comprises of regulations and directives which are legislative acts of a binding nature. Other legal instruments like decisions, opinions and recommendations are also significant, but not binding on all Member States. Another relevant body of EU law is the decisions of the Court of Justice of the European Union (CJEU).

a. Treaty Law

Certain trade union rights have been recognized at the EU level. These include the freedom of assembly and of association,[263] workers' rights to information and consultation with the undertaking,[264] and the right to collective bargaining and action.[265]

Article 153 of the Treaty on the Functioning of the EU (TFEU) (Article 137 of the Treaty of Rome) lists the areas in which the EU must support and complement Member States' activities – including 'equality between men and women with regard to labour market opportunities and treatment at work'. However, Clause 5 of this Article lays down that the EU does not have the competence to regulate the right of association, the right to strike or the right to impose lockouts. This might suggest that EU law does not regulate the internal governance of trade unions.

However, in *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking line Eesti*, the CJEU held in relation to this Article that, "even if, in the areas which fall outside the scope of the [Union's] competence, the Member States are still free, in principle, to lay down the conditions governing the existence and exercise of the rights in question, the fact remains that, when exercising that competence, the Member States must nevertheless comply with [Union] law".[266] The CJEU further elucidated that, "although the right to take collective action, including the right to strike, must therefore be recognised as a fundamental right which forms an integral part of the general principles of

[263] Consolidated Version of the Charter of Fundamental Rights of the European Union [2000] OJ C364/01, art 12.
[264] ibid, art 27.
[265] ibid, art 28.
[266] Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking line Eesti* [2007] ECR I-10779, [40].

Community law the observance of which the Court ensures, *the exercise of that right may none the less be subject to certain restrictions*. As is reaffirmed by Article 28 of the Charter of Fundamental Rights of the European Union, those rights are to be protected *in accordance with [Union] law and national law and practices*."[267]

While the CJEU has not expressly said that Member States have an obligation to regulate trade unions to ensure gender equality, the holding in *Viking* could arguably be interpreted to mean that Member States may restrict trade union rights in accordance with EU law. This is significant for EU law has multiple provisions requiring States to ensure gender equality in all areas.

Under the Treaty of the European Union (TEU),[268] Member States have agreed as follows:

> Article 2: The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.
>
> Article 3(3): It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

Furthermore, under the TFEU,[269] Member States have agreed:

> Article 8: In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.
>
> Article 9: In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.
>
> Article 10: In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex [inter alia].
>
> Article 19: Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex [inter alia].
>
> Article 157(4): With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

[267] ibid, [44].
[268] Consolidated Version of the Treaty on the European Union [2012] L C326/13.
[269] Consolidated Version of the Treaty on the Functioning of the European Union [2012] L C326/49.

Additionally, the Charter on Fundamental Rights of the European Union (EU Charter)[270] came into force with the following binding provisions:

> Article 20: Everyone is equal before the law.
> Article 21: Any discrimination based on any ground such as sex [inter alia] shall be prohibited.
> Article 23: Equality between men and women must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

The text of Article 23 of the EU Charter clearly indicates that Member States have a positive obligation to ensure gender equality more generally. Moreover, both direct and indirect discrimination are prohibited under EU law.[271]

Therefore, by virtue of the decision in *Viking*, Member States can arguably regulate trade unions to ensure that they do not discriminate against women, and to ensure women's effective participation in trade unions.

With respect to gender-based violence, Member States are under obligations agreed to by the EU in acceding to the Council of Europe Convention on Preventing and Combatting Violence against Women and Domestic Violence.[272] The Convention addresses both violence against and gender-based violence against women.[273] It characterizes them as forms of discrimination[274] and imposes an explicit obligation to legislate to both promote and protect the right of everyone, particularly women, from violence in both public and private sectors.[275] As a result, though there are no explicit references to trade unions as such, the drafting of the provisions are sufficiently conclusive to mandate action by States in those circumstances.

b. EU Directives

Some EU Directives make references to gender equality in trade unions.

Council Directive 76/207/EEC (now repealed) required equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.[276] Article 2 of the Directive stated that 'there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status'. In *P v.*

[270] EU Charter (n 263).
[271] European network of legal experts in gender equality and non-discrimination, *Gender equality law in Europe* 11-12 (December 2016).
[272] Convention on Preventing and Combatting Violence against Women and Domestic Violence (adopted 11 May 2011, entered into force 01 August 2014) CETS No. 210.
[273] ibid, art 3.
[274] ibid.
[275] ibid, art 4.
[276] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [2002] OJ L192/27.

S and Cornwall County Council,[277] the ECJ held that discrimination on gender reassignment amounts to sex-based discrimination prohibited under this Directive.

Article 2 of this Directive further encouraged States to take measures that promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities. Significantly, in *Badeck*, the CJEU held that Article 2 "does not preclude a national rule relating to the composition of employees' representative bodies, which recommends that the legislative provisions adopted for its implementation take into account the objective that at least half the members of those bodies must be women."[278] However, the ruling did not impose an obligation on States to adopt such a rule.

This changed with Directive 2002/73/EC of the European Parliament and of the Council (now repealed) amending Council Directive 76/207/EEC above.[279] This Directive defined and prohibited direct and indirect discrimination on the ground of sex "in relation to membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organizations."[280] Such organizations of workers include trade unions.

The Directives mentioned above were repealed and recast in Council Directive 2006/54/EC,[281] which consolidates and adds to equal opportunities and treatment of men and women measures in matters of employment and occupation. Article 14 of the Directive expressly states that "there shall be no discrimination, indirect or direct, on the ground of sex in the public or private sectors in relation to membership of, and involvement in, an organization of workers or employers, or any organization whose members carry on a particular profession, including the benefits provided for by such organizations". As a result, Member States can be seen to have a clear positive obligation to prevent discrimination against women in trade unions. Moreover, the Directive defines discrimination as including 'sexual harassment',[282] implying that even sexual harassment in trade unions is prohibited. To this end, Member States are required to provide access to judicial procedures for the enforcement of obligations under this Directive.[283] Article 3 of the Directive, titled 'positive action', further provides that Member States *may* maintain or adopt measures with a view to ensuring full equality in practice between men and women in working life.

[277] Case C-13/94 *P v S and Cornwall County Council* [1996] ECR I-2143.
[278] Case 158/97, *Georg Badeck and Others, interveners: Hessische Ministerpräsident and Landesanwalt beim Staatsgerichtshof des Landes Hessen* [2000] ECR 2000 I-01875, [66].
[279] Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [2002] OJ L 269.
[280] ibid, art 1.
[281] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L 204/23.
[282] ibid, art 2.
[283] ibid, art 17.

QUESTION 2: Do the relevant rules of international law impose any positive obligations upon the State to prevent direct or indirect discrimination on the grounds of gender, sex, parental status or pregnancy and/or to prevent or address gender-based violence at work, including sexual harassment?

Many EU treaties (and hence positive obligations) addressing discrimination on the grounds of gender and/or sex and gender-based violence have been addressed in response to the previous question. They will not be repeated here. However, as regards discrimination based on parental status, it bears to note that Article 33(2) of the EU Charter recognizes a general right to reconcile family and professional life and also envisages protection while on maternity leave, a right to paid maternity leave and to parental leave.

Council Directive 2006/54/EC is again the main directive to look to for anti-discrimination and equality measures. As mentioned above, Article 2 defines and prohibits direct and indirect discrimination as well as harassment and sexual harassment.

Article 2(2) of the Directive further prohibits any less favourable treatment of a woman related to pregnancy. As the CJEU held in *Dekker*, since only biological females can become pregnant, pregnancy discrimination constitutes direct sex discrimination.[284] Article 2(2) also prohibits any less favourable treatment of a woman related to maternity leave, while Article 15 protects the right of women to return to their job or an equivalent post at the end of their maternity leave. This is further supported by Recital 23, which states that: "it is clear from the case-law of the Court of Justice that unfavourable treatment of a woman related to maternity constitutes direct discrimination on grounds of sex."

Council Directive 92/85/EEC requires Member States to introduce measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.[285]

Council Directive (EU) 2019/1158[286] requires Members States to ensure equality and hence no discrimination in any form directed at those involved in flexible working arrangements or time off arrangements such as paternal, parental and carer's leave.[287] This directive is also relevant with respect to maternal leave.

More general protection against gender-based violence at work is provided for via EU worker's health and safety laws, which primarily stem from the EU Treaty, although subsequent

[284] Case 177/88, *Dekker v. Stichting Vormingscentrum voor Jong Volwassenen* [1990].
[285] Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) [1992] OJ L 348/01.
[286] Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU [2019] L 188/79.
[287] ibid.

Directives building upon those fundamental principles have been adopted.[288] The main Directive is Directive 89/391/EEC.[289] Article 5(1) of this Directive stipulates that every employer shall have a duty to ensure the safety and health of workers in every aspect related to the work" As noted by the European Trade Union Confederation,[290] gender-based violence, including sexual harassment, falls within the ambit of 'worker's health and safety' under the said Directive. How EU Member States should enforce this Directive remains at the discretion of each Member State. As such, each country may decide instructions, campaigns and inspection visits. However, in *Commission v Italy*, the CJEU held that all EU Member States must ensure that employers conduct risk assessments for all potential sources of risks in the workplace, as required by Article 6(3)(a) of Directive 89/391/EEC.[291]

[288] Lone Jacobsen, Viktor Kempa & Laurent Vogel, "Finding Your Way in the European Union Health and Safety Policy" *European Trade Union Institute Guide (2006),* 6.
[289] Council Directive 89/391/EEC of 12 June 1989 on the Introduction of Measures to Encourage Improvements in the Safety and Health of Workers at Work.
[290] European Trade Union Confederation, "Autonomous Framework Agreement on Harassment and Violence at Work," 8 https://www.etuc.org/sites/default/files/BROCHURE_harassment7_2__1.pdf.
[291] C-49/00 *Commission v Italy*, [2001] ECR I-08575.

B. DOMESTIC LAW

I. India

QUESTION 3: Are there any laws in India that impose obligations upon trade union organizations to ensure that the rules and processes that govern trade union formation, leadership elections, internal trade union governance procedures, as well as collective bargaining and strikes: (a) do not directly or indirectly discriminate against women; and/or (b) ensure the effective participation of women as trade union members and leaders; and/or (c) are free from gender-based violence?

a. International Obligations

Article 51 of the Indian Constitution imposes an obligation on the State to "foster respect for international law and treaty obligations in the dealings of organizes peoples with one another". By virtue of this provision, the Indian Supreme Court has been quite forthcoming in giving effect to India's international obligations. A notable example is the case of *Vishaka v. State of Rajasthan*, in which the Indian Supreme Court held down that "in the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all workplaces, the content of international conventions and norms are significant for the purpose of interpretation of [constitutional rights to equality and life]."[292] Therefore, India's international obligations are of importance in understanding its domestic law.

India has ratified a number of international legal instruments that require it to ensure that trade unions protect the rights of women.

India has been a member of the ILO since 1922. India ratified the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) on 3 June 1960. This Convention imposes obligations on States to ensure that workers' organizations (i.e. trade unions) do not violate the national policy on preventing discrimination. Significantly, India has not ratified the *Freedom of Association and Protection of the Right to Organise Convention*, 1948 (No. 87) and the *Right to Organise and Collective Bargaining Convention*, 1949 (No. 98).

India ratified the ICESCR in 1979. Under this Covenant, Article 3 imposes a cross-cutting non-discrimination obligation, which covers all other rights in the ICESCR,[293] including the right to work (Article 6), the right to just and favourable conditions of work (Article 7), the right of everyone to form and join trade unions of their choice, for the promotion and protection of his economic and social interests, as well as the right of trade unions to function freely, and the right to strike (Article 8). Family rights and protection of women in relation to childbirth are also included under Article 10. However, India has not ratified the *Optional Protocol to the*

[292] (1997) 6 SCC 241.
[293] GC 16 (n 168) [22].

International Covenant on Economic, Social and Cultural Rights, which allows for submitting individual complaints of violations.

b. Domestic Obligations

While there is no specific statute preventing trade unions from discriminating against women, the Supreme Court judgment in *Charu Khurana and Ors vs Union of India and Ors*[294] struck down a clause of the Cine Costume Make-Up Artists and Hair-Dressers Association bye-laws that prohibited women from becoming members. The petitioners argued that the clause violated the constitutional right to equality before the law, the right to be free from discrimination on the grounds of sex, the right to practice any profession, and the right to life (construed as the right to a livelihood). As these constitutional guarantees are only applicable to the State, the petitioners were demanding the horizontal enforcement of these rights to affect private party duties. The Court reasoned that the Association is a registered trade union under the Trade Unions Act of 1926, and the Act stipulates that any person who has attained the age of fifteen years may be a member of a registered Trade Union – therefore, any trade union registered cannot form rules inconsistent with this, and the Act only lays down requirements relevant to age.

There seem to be no other laws that either impose obligations on trade unions to ensure that leadership elections are non-discriminatory, that governance procedures do not discriminate, or that relate to collective bargaining. The Industrial Disputes Act 1947 requires that the Grievance Redressal Committee set up by employers must have at least one woman, but this has no relation to the internal functioning of a representative union. While some trade unions have formulated internal policies on sexual harassment, this is entirely discretionary and there is little information on their implementation or functioning.

QUESTION 4: Are there any laws in India that: (a) prohibit direct or indirect discrimination on the grounds of gender, sex, parental status or pregnancy; and/or (b) seek to prevent or address gender-based violence at work, including sexual harassment?

a. International Obligations

India ratified the ILO Discrimination (Employment and Occupation) Convention 1958 (No. 111), which calls for the elimination of discrimination against women in all matters of employment and occupation, on 3 June 1960. Further, it supported the 1998 Declaration on Fundamental Principles and Rights at Work, which commits Member States to promote the elimination of discrimination in respect of employment and occupation.[295] The ILO Declaration on Global Justice for a Fair Globalization adopted by all ILO Member States in 2008, including India, also reiterates the fundamental and cross-cutting importance of gender equality and non-discrimination in the workplace.

[294] [2015] 1 SCC 192.
[295] International Labour Conference, Report of the Committee on the Declaration of Principles, 86th Session of the ILC, Geneva, June 1998, http://www.ilo.org/public/english/standards/relm/ilc/ilc86/com-decd.htm#SINGH.

But, notably, India has not ratified the following conventions:

- Maternity Protection Convention, 1919 (No. 3); Maternity Protection Convention (Revised), 1952 (No. 103); Maternity Protection Convention, 2000 (No. 183)
- Workers with Family Responsibilities Convention, 1981 (No. 156)
- Domestic Workers Convention, 2011 (No. 189)
- Violence and Harassment Convention, 2019 (No. 190)

In Observation (CEACR), adopted in 2017 and published in the 107th ILC Session (2018), the Committee urged India to improve the practical application of the Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act 2013, and any other measures adopted or envisaged to combat sexual harassment and violence against women related to the workplace. It also urged India to promote equality of opportunity and treatment between men and women in employment and occupation, advance gender equality and address occupational gender segregation.

India ratified the ICCPR in 1979. Its article 22(3) provides that "[e]veryone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests". Article 26 further stipulates: "the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground [including sex]."

India ratified the CEDAW in 1993. Article 11(1) of the CEDAW is aimed at eliminating discrimination against women in the field of employment, in order to ensure that men and women enjoy the same rights, including the right to work, to equal remuneration, to social security, and to protection of health and safety, including the safeguarding of the function of reproduction. Article 11(2) obliges States to take measures to prevent discrimination against women on the grounds of marital status or maternity. Article 15 further provides that "States Parties shall accord to women equality with men before the law". However, there is no mention of women's right of association and to be protected from discrimination in participation in trade unions or other employee organizations.

b. Domestic Obligations

i. Direct discrimination

1. <u>Sex and gender</u>

Article 14 of the Constitution of India guarantees equality before the law, and the equal protection of laws within the territory of India. It expressly prohibits discrimination on the grounds of sex. However, this is restricted to forbidding State discrimination and does not apply to private persons. The Indian Supreme Court held in *V.G. Row* vs *State of Madras*[296], that

[296] [1952] AIR 196.

reasonable classification is permissible when based on a substantial distinction bearing a reasonable relation to the object sought to be obtained.

Article 15 guarantees that the State will not discriminate on the basis of sex. The test to be satisfied is that unwarranted differentiation was made by the State, and that this differentiation adversely affected the plaintiff. This extends to all legislative, executive and judicial actions of the government. Article 16 guarantees to every citizen equal opportunity in matters relating to government employment. No citizen shall be ineligible for or discriminated against in government employment on the grounds of sex. This applies to both initial appointment as well as promotion, pay, transfer and retirement. However, this is limited to public employment, and does not cover discrimination by private employers. Article 42 of the Constitution states that the State shall make provisions for securing just and humane conditions of work and for maternity relief.

The Transgender Persons (Protection of Rights) Act 2019 expressly prohibits discrimination against a transgender person on the grounds of: the denial, or discontinuation of, or unfair treatment in, educational establishments and services; the unfair treatment in employment or occupation; denial or termination from employment or occupation; discrimination in healthcare services; discrimination in any goods, accommodation, services, facilities, benefits or privileges for the use of the general public; discrimination in the right to movement; discrimination in the right to occupy property; the opportunity to stand for or hold public or private office; or the denial of access to, removal from, or unfair treatment in Government or private establishment in whose care or custody a transgender person may be. Discrimination against transgender people is also outlawed in Chapter V and VI of the same Act. However, these provisions seem as though they depend upon State recognition of transgender identity, based on an application to the District Magistrate. This Act followed the Supreme Court judgment in *National Legal Services Authority* vs *Union of India and Ors* [2014][297], where the Court held that the anti-discrimination provisions under Articles 14 to 16 included the right to not be discriminated against on the grounds of sexual orientation and gender, and 'sex' in Article 15 and 16 include other self-identified gender identities.

The Equal Renumeration Act 1976, Section 5 prohibits employers from formulating hiring processes that disadvantage women on the account of their gender in reference to work similar to that offered to men, and mandates that there should be equal pay for equal work.

At the state level, Section 13 of the Maharashtra Shops and Establishments Act 2017 prohibits discrimination against women working in registered shops and establishments in the matter of recruitment, training, transfers, promotions or wages. These provisions are also contained in the Model Bill drafted by the Ministry of Labour and Employment, but have not been legislated by every state.

[297] 5 SCC 438.

The case law on sex discrimination between private parties has not been consistent. In *Walter Alfred Baid vs Union of India and Ors*[298], the Delhi High Court struck down a prohibition on hiring male senior nursing tutors by arguing that there was no basis in the law for such a prohibition; while in *R.S. Singh*[299], the Punjab and Haryana High Court upheld an order making women ineligible to work as jail superintendents in men's prisons as they claimed that women would not be effectively able to work in men's prisons. Similarly, with regard to discrimination in the recruitment of married women, the Orissa High Court ruled that it was a violation of Article 16 in *Radha Charan Patnaik v State of Orissa and Ors*[300] and that it amounted to sex discrimination; while in *Bombay Labour Union v International Franchises*[301] the Supreme Court, in reference to a rule that allowed for the central government to ask a married woman to resign if necessitated by efficiency considerations, that this was not discriminatory as it does not compel women who marry to resign but only when the marriage is found to impair efficiency.

2. Parental status and pregnancy

The Maternity Benefit Act 1961 prohibits the termination of employment of a pregnant woman employee and mandates the provision of maternity benefits to such women. It also prohibits the deduction of wages for women unable to perform strenuous tasks during pregnancy, and for a pregnant woman to be dismissed while on maternity leave. A woman suffering from an illness arising out of pregnancy, delivery, birth, miscarriage, medical termination, or a tubectomy is entitled to an extra month of maternity benefits with a medical bonus of INR 3,500. This will be paid out of the Employees' State Insurance scheme if the employee has state insurance cover. The provisions of the Maternity Benefit Act are also applicable to surrogate mothers and provide for maternity leave to adoptive mothers who are adopting children below the age of three months.

This Act was amended in 2017. The key changes include: (i) increased paid maternity leave from 12 weeks to 26 weeks for women employees, unless they have two or more surviving children; (ii) recognition of the rights of an adopting mother and of a commissioning mother (using a surrogate to bear a child) for the first time, who may claim paid maternity leave for 12 weeks; (iii) a "work from home" option that may be of benefit after the maternity leave expires; (iv) and, effective as of the 1st of July, 2017, mandatory crèche (day care) facilities for every establishment employing 50 or more employees, including the right of mothers to visit the crèche four times per day.

There has been some case law on dismissals or unfair rules impacting on pregnant employees in public enterprises. In *Air India vs Nergesh Meerza and Ors* [1981][302] the Supreme Court struck down a clause that provided for the retirement of air hostesses after their first pregnancy

[298] AIR 1976 Delhi 302.
[299] Raghubans Saudagar Singh vs The State of Punjab And Ors [1972] AIR 1972 P H 117.
[300] [1969] AIR 1969 Ori 237.
[301] [1966] AIR 942.
[302] AIR 1829.

(however, it amended this to the third pregnancy instead). In *Neera Mathur vs Life Insurance Corporation* [1991],[303] a clause where the employer could require recruits to undergo pregnancy tests or ask details of menstrual history was struck down.

ii. Indirect discrimination

1. Sex and gender

There is no law, at present, in India that prohibits indirect discrimination. However, there have been some case law on this matter, particularly related to sex discrimination in relation to pregnancy summarized below.

2. Parental status and pregnancy

There is no law outlawing indirect discrimination against women who may be pregnant, or parents or caretakers. There is some case law on this issue. In *Inspector (Mahila) Ravina vs Union of India* [2015],[304] there was a challenge to a denial of promotion of a woman in the Central Police Reserve Force who could not attend a pre-promotional course as she was pregnant when it took place. After her pregnancy was over, she attended the compulsory course and fulfilled the requirements for promotion, but she was not promoted. The Delhi High Court held that this violated the right to life (Article 21) and the judgment also drew it within the ambit of discrimination on grounds of sex. However, in 2018, in *Ankita Meena v University of Delhi* [2018],[305] a writ petition filed by a pregnant student barred from sitting university exams as she had not met the requisite attendance requirement as a result of pregnancy was dismissed by the Delhi High Court. The Kerala High Court in 2016 also refused to grant relief to a pregnant student who was disqualified from appearing for her University examinations as she had not met the attendance requirement.

In *Khusbu Sarma* v *Bihar Police Sub-ordinate Service Commission and Ors* [2019],[306] the petitioner was unable to attend a physical evaluation as part of the recruitment process for the police force as she was pregnant at the time. She received no response from the police after she had asked for an extension and applied for relief with the Court. The Supreme Court allowed the appeal and directed the Commission to conduct the evaluation for all female candidates previously unable to participate on account of pregnancy. The Court did not engage with equality considerations in its judgment, however, and merely looked at the necessity of hiring female police staff, and the fact that the examination schedule had not been released earlier on, which would have allowed women to 'plan' around it.

[303] 1992 AIR 392.
[304] W.P. (C) 4525/2014.
[305] W.P. (C) 5194/2018.
[306] IA 93110/2019,93111/2019, in Petition(s) for Special Leave to Appeal (C) No(s). 14225/2019.

iii. Gender-based violence at the workplace

The key statute in this area is the Sexual Harassment at Workplace (Prevention, Prohibition and Redressal) Act 2013, which superseded the Supreme Court judgment in *Vishaka* [1997].[307] It places employers under a positive duty to not only redress sexual harassment in the workplace but to prevent its occurrence. It defines sexual harassment as unwelcome acts or behaviour of the following: physical contact and advances; a demand or request for sexual favours; making sexually coloured remarks; showing pornography; any other unwelcome physical, verbal or non-verbal conduct of a sexual nature. It also defines the 'workplace' slightly more broadly, to include any department or organization under the auspices of government or a private sector institution or service provider, hospitals or nursing homes, sports institutes, and any place visited by the employee arising out of or during the course of employment. It requires employers to set up an Internal Complaints Committee, with rules as to its composition, sets out the procedure for inquiry, and the duties of the employer in assisting women with complaints filed as well as sensitizing employees to the provisions of the Act.

There is no other statute that deals specifically with discrimination and violence against women at the workplace, though this could be litigated under relevant Indian Penal Code provisions.

[307] Vishaka (n 292).

II. Canada

QUESTION 3: Are there any laws in India that impose obligations upon trade union organizations to ensure that the rules and processes that govern trade union formation, leadership elections, internal trade union governance procedures, as well as collective bargaining and strikes: (a) do not directly or indirectly discriminate against women; and/or (b) ensure the effective participation of women as trade union members and leaders; and/or (c) are free from gender-based violence?

a. International Obligations

The Supreme Court of Canada has reiterated that the Canadian Charter "should be interpreted consistently with Canada's international obligations."[308] In fact, "the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified".[309] For example, in *Saskatchewan Federation of Labour v. Saskatchewan*,[310] the Supreme Court recognized that the right to strike is essential to the right to meaningful process of collective bargaining and is thus constitutionally protected under section 2(d) of the Canadian Charter of Rights and Freedoms, in accordance with Canada's international obligations under international human rights and labour law instruments. In this light, Canada's international obligations are also of relevance in understanding its domestic law.

Canada has ratified a number of international legal instruments that require it to ensure that trade unions protect the rights of women.

Canada has been a member of the ILO since 1919. Canada has ratified only a limited number of ILO Conventions[311] and amongst them is Convention No. 111 which Canada ratified on 26 November 1964. This Convention imposes obligations on States to ensure that workers' organizations (i.e. trade unions) do not violate the national policy on preventing discrimination. While Canada has also ratified the Convention No. 87 (ratified on 23 March 1972) and Convention No. 98 (ratified on 14 June 2017), they do not expressly refer to the elimination of discrimination in trade unions. At the same time, the CEACR is cognizant of the gender implications of these two conventions and requires States to ensure that there is no direct or indirect discrimination against women.[312]

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[308] *Henry v. British Columbia (Attorney General),* 2015 SCC 24 (CanLII), [2015] 2 SCR 214, [136].
[309] *Revell v. Canada (Citizenship and Immigration),* 2019 FCA 262, [132]. In this decision the Federal court of Appeal ruled nonetheless that "While principles of international law may inform the interpretation of the Charter, international developments are not sufficient, in and of themselves, to justify departing from the principles established in Canadian law." [135].
[310] 2015 CSC 4, [2015] 1 R.C.S. 245, [62-75].
[311] For the full list of Canadian ratifications of ILO Conventions, see: https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102582.
[312] General Survey 2012 (n 15) [58], [68].

Since 1982, Canadian unions have submitted more complaints to the ILO's Freedom of Association Committee (CFA) than any other country in the world, alleging violations of ILO conventions.[313] In the great majority of complaints, the CFA found there to be a violation of ILO freedom of association principles.[314] The ILO rulings are said to have a significant influence on the application of Canadian Charter protections by domestic courts.[315]

While most CFA cases pertain to anti-union discrimination, one case considered the disparate impact of the Labour Code on the right to freedom of association of women workers.[316] The complainant alleged that the Government was denying some workers (in the early childhood education, health and social services) of 'employee status' under the Labour Code, thereby denying them the right to unionize and the right to bargain collectively through independent trade union organizations. The complainant further alleged that these laws were discriminatory because they targeted jobs that were predominantly taken up by women. While the Committee did not specifically comment on the disparate impact on women, it acknowledged that the laws denied the freedom of association to the affected workers.

Canada ratified the ICESCR in 1976. Under this Covenant, Article 3 imposes a cross-cutting non-discrimination obligation, which covers all other rights in the ICESCR,[317] including the right to work (Article 6), the right to just and favourable conditions of work (Article 7), the right of everyone to form and join trade unions of their choice, for the promotion and protection of his economic and social interests, as well as the right of trade unions to function freely, and the right to strike (Article 8). Family rights and protection of women in relation to childbirth are also included under article 10. However, Canada has not ratified the *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, which allows for submitting individual complaints of violations.

b. Domestic Obligations

Apart from the above international obligations, some federal legislations[318] in Canada also impose obligations on trade unions and employee organizations to ensure that they do not discriminate against women. These are described below:

[313] NUPGE Canada, Canada and the International Labour Organization (ILO), February 2014, https://nupge.ca/sites/default/files/publications/ilo_backgrounder_-_february_2014.pdf, p. 4.
[314] ibid.
[315] ibid, 5.
[316] Case No 2314 (Canada), Complaint date 19 December 2003, Report No 340, March 2006, available at https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2908391 .
[317] GC 16 (n 168) [22].
[318] See ILO database: https://www.ilo.org/dyn/natlex/natlex4.countrySubjects?p_lang=en&p_country=CAN&p_order=HIERARCHY

i. The Canadian Human Rights Act[319]

This law applies only in relation to federal public service employees – its scope of application is thus limited. While it is not a constitutional document, it has a special status and thus prevails over incoherent legislation, unless an exception is explicitly created by such legislation. To that effect, the Canadian Federal Court has stated that: "public servants are entitled to employment treatment and conditions in compliance with the clear principle, stated purpose and precise provisions of the CHRA."[320] Note that this Act only applies within the realm of federal jurisdiction; each provincial jurisdiction has enacted its own anti-discrimination law.[321]

The Act defines "employee organization" in Section 25 as including "a trade union or other organization of employees or a local, the purposes of which include the negotiation of terms and conditions of employment on behalf of employees."

Section 3 of the Act prohibits discrimination on the grounds of sex – which is deemed to include pregnancy and childbirth[322] – as well as gender identity or expression, marital status, and family status.

Section 9 of the Act provides that "It is a discriminatory practice for an employee organization on a prohibited ground of discrimination (a) to exclude an individual from full membership in the organization; (b) to expel or suspend a member of the organization; or (c) to limit, segregate, classify or otherwise act in relation to an individual in a way that would deprive the individual of employment opportunities, or limit employment opportunities or otherwise adversely affect the status of the individual, where the individual is a member of the organization or where any of the obligations of the organization pursuant to a collective agreement relate to the individual."

An important provision to be emphasised upon is Section 10 of the Act which deals with matters pertaining to the internal affairs of the organisations. Section 10 provides that "It is a discriminatory practice for an employer, employee organization or employer organization (a) to establish or pursue a policy or practice, or (b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment, that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

Section 14(1) provides that "it is a discriminatory practice […] (c) in matters related to employment, to harass an individual on a prohibited ground of discrimination". Moreover,

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[319] RSC 1985, c H-6.
[320] *MacNeill v. Canada (Attorney General)*, [1993] 3 FC 575; appeal granted for other reasons (1994) 3 C.F. 261 (C.A.); 1994 CanLII 3496 (CAF) (request for authorisation to appeal rejected: (1995) 1 R.C.S. VIII).
[321] International Labour Organization, *Canada (Federal only)*, https://www.ilo.org/dyn/eplex/termmain.showCountry?p_lang=en&p_country_id=CA.
[322] Section 3(2) of the Charter.

Section 14(2) states that sexual harassment is be deemed to be harassment on a prohibited ground of discrimination. This general prohibition of sexual harassment, presumably, applies to employee organizations as well.

Exceptions to these provisions are provided at Section 15(1) of the Act. Notably, a practice whereby "an employee organization grants a female employee special leave or benefits in connection with pregnancy or child-birth or grants employees special leave or benefits to assist them in the care of their children" is not discriminatory.[323] Section 16 stipulates that special programs (and the collection of information to that end) designed to prevent, eliminate or reduce disadvantages suffered by individuals or groups on prohibited grounds of discrimination, notably by improving opportunities respecting employment, do not constitute discriminatory practices.

ii. Canadian Labour Code[324]

The *Canadian Labour Code* covers employees working in federally regulated workplaces (including interprovincial and international services such as railways, road transport, telephone, telegraph, and cable systems, pipelines, canals, tunnels, bridges, shipping; radio and television broadcasting; air transport; banks, etc.) and most federal crown corporations (for example, Canada Mortgage and Housing Corporation and the Canada Post Corporation).[325]

Part I (Industrial Relations) of the Act applies, as provided under section 4, "in respect of employees who are employed on or in connection with the operation of any federal work, undertaking or business, in respect of the employers of all such employees in their relations with those employees and in respect of trade unions and employers' organizations composed of those employees or employers". It also applies, under section 5, "in respect of any corporation established to perform any function or duty on behalf of the Government of Canada and in respect of the employees of any such corporation".

An important provision is Section 37 which provides a "duty of fair representation" incumbent on the trade union and its representatives: "A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

[323] Section 15(1)(f).
[324] RSC 1985, c L-2.
[325] See Government of Canada, *Summary of Part III of the Canadian Labour Code*, https://www.canada.ca/en/employment-social-development/services/labour-standards/reports/code-summary-3.html.

Regarding the operation of hiring halls,[326] Section 69(2) provides that "Where, pursuant to a collective agreement, a trade union is engaged in the referral[327] of persons to employment, it shall establish rules for the purpose of making such referrals and apply those rules fairly and without discrimination."

Section 95 provides that: "No trade union or person acting on behalf of a trade union shall […] (f) expel or suspend an employee from membership in the trade union or deny membership in the trade union to an employee by applying to the employee in a discriminatory manner the membership rules of the trade union; (g) take disciplinary action against or impose any form of penalty on an employee by applying to that employee in a discriminatory manner the standards of discipline of the trade union.

It is to be noted that while the right of all employees to employment free of sexual harassment is stipulated at sections 247.2, it is framed as a responsibility incumbent on the employer; it does not make any reference to trade unions in that regard.

QUESTION 4: Are there any laws in Canada that: (a) prohibit direct or indirect discrimination on the grounds of gender, sex, parental status or pregnancy; and/or (b) seek to prevent or address gender-based violence at work, including sexual harassment?

a. International Obligations

Canada has ratified ILO Convention No. 111 which calls for the elimination of discrimination against women in all matters of employment and occupation. Canada has also declared its support for the 1998 Declaration on Fundamental Principles and Rights at Work, which commits Member States to promote the elimination of discrimination in respect of employment and occupation.[328] The ILO Declaration on Global Justice for a Fair Globalization adopted by all ILO Member States in 2008, including Canada, also reiterates the fundamental and cross-cutting importance of gender equality and non-discrimination in the workplace.

However, Canada has not ratified the following Conventions, although they are of significance from a gender perspective:

- Maternity Protection Convention, 1919 (No. 3); Maternity Protection Convention (Revised), 1952 (No. 103); Maternity Protection Convention, 2000 (No. 183)
- Workers with Family Responsibilities Convention, 1981 (No. 156)
- Domestic Workers Convention, 2011 (No. 189)
- Violence and Harassment Convention, 2019 (No. 190)

[326] *Hiring hall* is an organisation (usually under the patronage of a labour union) which has the responsibility of providing new recruits to employers who have a collective bargaining agreement with them.
[327] As per section 69(1) of the Code, *referral* includes assignment, designation, dispatching, scheduling and selection.
[328] NUPGE Canada (n 313) p. 3.

The ICCPR was ratified by Canada in 1976. Its article 22(3) provides that "[e]veryone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests". Article 26 further stipulates: "the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground [including sex]."

The CEDAW, adopted on 18 December 1979, was ratified by Canada in 1981. Article 11(1) is aimed at eliminating discrimination against women in the field of employment, in order to ensure that men and women enjoy the same rights, including the right to work, to equal remuneration, to social security, and to protection of health and safety, including the safeguarding of the function of reproduction. Article 11(2) obliges States to take measures to prevent discrimination against women on the grounds of marital status or maternity. Article 15 provides that "States Parties shall accord to women equality with men before the law". However, there is no mention of women's right of association and to be protected from discrimination in participation in trade unions or other employee organizations.

b. Domestic Obligations

The following federal legislations in Canada prohibit discrimination on the grounds of sex/gender, parental status or pregnancy; and gender-based violence at work:

i. The Canadian Charter of Human Rights and Freedoms

The Charter provisions apply to the Canadian federal State as well as provincial States – including both the legislature and government;[329] it does not however, bind private parties.[330] Section 15(1) of the Canadian Charter of Human Rights and Freedoms provides that "every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination, and in particular, [based on sex]." Paragraph 15(2) specifies that this does not preclude affirmative action programs aimed at ameliorating the condition of individuals or groups disadvantaged on this basis.

The list of grounds of discrimination is not exhaustively provided under Section 15; thus, analogous grounds may be incorporated.[331] Section 15 may not be invoked on its own; it can only be relied upon in conjunction with another protected right. Canadian courts have confirmed that "family status" or "parental status" is an analogous ground of discrimination under section 15.[332] "Pregnancy" was considered to be comprised within the discriminatory

[329] Canadian Charter of Human Rights and Freedoms, s. 32.
[330] Section 32 has however been interpreted broadly by the Canadian Supreme Court, in that a private entity can in fact be engaged in a "government action" and hence be subject to the Charter – see notably *Mckinney v. University of Guelph*, [1990] 3 SCR 229, pp. 273-275; *Eldridge v. British Columbia (Attorney General)*, 1997 CanLII 327 (SCC), [1997] 3 S.C.R. 624, [41-4].
[331] *Miron c. Trudel*, [1995] 2 R.C.S. 418, [147]; *Corbiere c. Canada (Ministre des Affaires indiennes et du Nord canadien)*, [1999] 2 R.C.S. 203, [13].
[332] See *Perigny v. Canada (Attorney General)*, 2003 FCA 94; *B. v. Ontario (Human Rights Commission)*, [2002] 3 SCR 403.

ground of "sex".[333] The Supreme Court has also stated that "marital status", in certain respects, may constitute an analogous ground.[334]

The Supreme Court also ruled that sexual harassment is a form of sex discrimination, under Section 15(1) of the Charter.[335]

ii. The Canadian Human Rights Act[336]

Section 3 of the Canadian Human Rights Act prohibits discrimination on the grounds of sex – which is deemed to include pregnancy and childbirth[337] – as well as gender identity or expression, marital status, and family status. In *Action Travail des Femmes v. Compagnie des chemins de fer nationaux du Canada*,[338] the Canadian Supreme Court held that, under the CHRA, the government is under a positive obligation to prevent discrimination against identifiable protected groups such as women, and that it may set up an employment equity program to break a continuing cycle of systemic discrimination.

Section 14(1) further provides that "it is a discriminatory practice […] (c) in matters related to employment, to harass an individual on a prohibited ground of discrimination". Moreover, Section 14(2) states that sexual harassment is be deemed to be harassment on a prohibited ground of discrimination. This general prohibition of sexual harassment, presumably, applies to employee organizations as well. In *Robichaud v. Canada* (Conseil du Trésor),[339] the Canadian Supreme Court held that employers have a positive obligation to provide a healthy work environment by preventing and eliminating undesirable acts like sexual harassment.

In two companion decisions, *Attorney General of Canada v. Fiona Johnstone and Canadian Human Rights Commission*[340] and *Canadian National Railway v. Denise Seeley and Canadian Human Rights Commission*,[341] the Federal Court of Appeal ruled that bona fide childcare obligations are included under family status as protected grounds in the Canadian Human Rights Act. Thus, employers must accommodate where a workplace rule interferes with the fulfilment of a childcare obligation. The complainant must show: (i) that a child is under his or her care and supervision; (ii) that the childcare obligation at issue engages the individual's legal responsibility for that child, as opposed to a personal choice; (iii) that he or she has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible, and (iv) that the impugned

[333] *Procureure générale du Québec c. Association des juristes de l'État*, 2017 QCCA 103, [30-33]; citing *Brooks c. Canada Safeway Ltd*., [1989] 1 RCS 1219, p. 1242-1244 et 1247.
[334] *Miron v. Trudel*, [1995] 2 SCR 418, [49], [55-62].
[335] *Janzen v. Platy Enterprises Ltd.*, 1989 CanLII 97 (SCC), [1989] 1 SCR 1252.
[336] RSC 1985, c H-6.
[337] Canadian Charter of Human Rights and Freedoms, s. 3(2).
[338] (1987) 1 RCS 1114.
[339] (1987) 2 RCS 84.
[340] 2014 FCA 110.
[341] 2014 FCA 111.

workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfilment of the childcare obligation.

iii. Canadian Bill of Rights[342]

The *Canadian Bill of Rights* is a federal statute of a constitutional nature that renders inoperative federal legislation inconsistent with its protections, unless an explicit exception is stipulated in that legislation.[343] It applies to all acts, rules or regulations enacted by or subject to be repealed, abolished or altered by the Parliament of Canada, as well as to matters falling within the legislative authority of the Parliament of Canada.[344] It applies in conjunction with the Canadian Charter,[345] as there is a significant overlap between the two human rights instruments. Section 1 recognizes the enjoyment in Canada of fundamental rights without discrimination by reason of sex. The rights listed include the right (a) "to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law"; (b) "to equality before the law and the protection of the law"; as well as to (e) "freedom of assembly and association". The Supreme Court has held that discrimination based on pregnancy constitutes discrimination based upon sex;[346] however, it appears that no decision interpreting specifically the *Canadian Bill of Rights* has discussed "parental status" as a discriminatory ground under this Act.

iv. Employment Equity Act[347]

The Act applies to private sector employers, and portions of the public sector listed in certain schedules of the *Financial Administration Act,* or otherwise employing one hundred or more employees.[348] Section 5 provides that all employers "shall implement employment equity by (a) identifying and eliminating employment barriers against persons in designated groups that result from the employer's employment systems, policies and practices that are not authorized by law; and (b) instituting such positive policies and practices and making such reasonable accommodations as will ensure that persons in designated groups achieve a degree of representation in each occupational group in the employer's workforce that reflects their representation" in the Canadian workforce or segments thereof from which the employer may reasonably be expected to draw employees. Designated groups include women, under Section 3 of the Act. The Act further provides that an employer must prepare an employment equity plan, and in doing this, it must consult with its employees' representatives or bargaining agent.

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[342] SC 1960, c 44.
[343] See *Authorson v. Canada (Attorney General),* 2003 SCC 39 [10]; *Air Canada c. Canada (Procureure générale),* 2003 CanLII 32929 (QC CA), [43].
[344] Canadian Bill of Rights (n 343) s. 5(2) and (3).
[345] Section 26 of the Charter provides: The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.
[346] See *Brooks c. Canada Safeway Ltd*., [1989] 1 R.C.S. 1219, overturning *Bliss v. Attorney General of Canada*, [1979] 1 SCR 183.
[347] SC 1995, c 44.
[348] ibid, s. 4(1).

v. Public Service Employment Act[349]

This Act applies to the federal public service. Section 65(8) provides that the Federal Public Sector Labour Relations and Employment Board may apply the *Canadian Human Rights Act*, other than its provisions relating to the right to equal pay for work of equal value. If the Board finds that discrimination was perpetrated, corrective action may include an order for relief in accordance with paragraph 53(2)(e) or subsection 53(3) of the Canadian Human Rights Act (i.e., compensation of an amount not exceeding twenty thousand dollars). Under Section 81(2), where a complaint is made against an internal appointment made by the Commission, if the Board finds that discrimination has occurred, it may order relief in accordance with paragraph 53(2)(e) or subsection 53(3) of the Canadian Human Rights Act.

[349] SC 2003, c 22, ss. 12, 13

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