

Mapping anti-discrimination law onto inequality at work: Expanding the meaning of equality in international labour law

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***Abstract.** This article explores the evolving relationship between the concept of discrimination in international labour law and the socio-economic phenomenon of inequality at work. While non-discrimination was initially understood as a fairly limited legal principle mandating equal treatment for similarly situated individuals, it subsequently expanded to address indirect discrimination resulting from apparently neutral rules, standards and practices at work. It has expanded further to take on group-based patterns of inequality at work related to the structural constraints of the market, the family and community life, ultimately resulting in convergence between anti-discrimination law and legal initiatives to reduce class-based socio-economic inequality and poverty.*

In examining the complex relationship between the legal concept of discrimination and the socio-economic phenomenon of inequality at work, the idea of mapping provides us with a useful conceptual tool. As a two-dimensional form of spatial imagery that contemplates multiple overlapping layers and concentric circles, it helps us to understand how an expanding legal conception of discrimination in international labour law has the potential to address a significant range of social and economic inequalities. While non-discrimination was initially understood as a fairly limited legal principle that mandated equal treatment for similarly situated individuals, it subsequently expanded to embrace indirect or effects-based discrimination, resulting from seemingly neutral rules, standards and practices at work. More recently, it has been extended further to address group-based patterns of systemic inequality at work that are related to the structural constraints of the market, the family and community

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life. And these structural aspects of discrimination are increasingly understood to have local, national, regional and global dimensions.

As protection against discrimination in the workplace expands to encompass the systemic and structural sources of exclusion and disadvantage, moreover, a convergence has occurred between anti-discrimination law, on the one hand, and other legal and policy initiatives to reduce class-based socio-economic inequality and poverty, on the other. Anti-discrimination law was historically limited to remedying horizontal inequality linked to group-based exclusions and disadvantage, based on race, national or ethnic origin, sex, and religion. In contrast, the remedying of social inequality and poverty has focused on vertical inequalities between workers and employers, and the exclusions faced by socially and economically marginalized individuals outside of the formal labour market.¹ More recently, however, convergence has resulted from increased recognition that socio-economic disadvantage and poverty are significant dimensions of discrimination – disproportionately experienced by those groups protected by traditional anti-discrimination safeguards (e.g. women, racialized communities, persons with disabilities).² There is also growing recognition that individuals should not be subjected to discrimination based on poverty or membership of marginalized economic or social groups.³ Convergence is also reinforced by endorsements of the need for justiciable economic and social rights and their equitable enjoyment (see, for example, Arbour, 2005; Dennis and Stewart, 2004; Jackman, 1999). Legal remedies in some anti-discrimination cases impose precisely the kinds of positive obligations on state actors that are associated with economic and social rights guarantees.⁴ Moreover, in the past, labour law, with

¹ For a discussion of the distinction between vertical and horizontal inequality, see Hepple (2001, pp. 11–12). See also Walby (2000).

² “As discrimination may cause poverty, poverty also causes discrimination. In addition to bias towards their race, colour, gender and social origin, the poor are also subject to discriminatory attitudes by governmental authorities and private actors simply because they are poor. The twin principles of equality and non-discrimination require States to take special measures to prohibit discrimination against the poor and to provide the poor with equal and effective protection against discrimination” (quoted from the *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies*, adopted by the Office of the United Nations High Commissioner for Human Rights, see UNHCHR, 2006, p. 10, para. 46)

³ See, for example, Economic and Social Council, Committee on Economic, Social and Cultural Rights (Forty-second Session, Geneva, 4–22 May 2009): *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)*, E/C.12/GC.20, 2 July 2009, Geneva, United Nations, para. 35. See also Kabeer (2000).

⁴ See, for example, *Eldridge v. Attorney General (British Columbia)*, [1997] 3 S.C.R. 624 (where the Supreme Court of Canada held that hospitals must provide deaf persons with sign language interpretation in order to ensure equal provision of medical services); *Treatment Action Campaign (TAC) v. Minister of Health*, 2001 SA CLR LEXIS 123 (where the High Court of South Africa held that the South African government had an obligation to institute a country-wide HIV/AIDS prevention programme to address mother-to-child transmission); and *Olga Tellis v. Bombay Municipal Corporation* [1985] 2 Supp SCR 51 (India); (1987) LRC (Const) 351 (Supreme Court of India) (where the Supreme Court of India held that pavement and slum dwellers were entitled to alternative accommodation upon government demolition of their shelter or eviction). See also Fredman (2008 and 2005).

its focus on collective bargaining and employment standards in the formal labour market, too often excluded the concerns of marginalized workers who also tend to be members of the social groups traditionally protected by anti-discrimination law (Blackett and Sheppard, 2003; Fudge and Owens, 2006; Vosko, 2010⁵). Increasingly, however, international labour law is expanding to address the concerns and needs of more vulnerable members of society.⁶ One objective of the mapping exercise undertaken in this article, therefore, is to explain how a broadening of the legal meaning of discrimination converges with an expanding understanding of international labour law and, more broadly, with growing concerns about socio-economic inequality globally.

Understanding the legal meaning of discrimination at work has become increasingly important since the affirmation of equality as one of the four fundamental principles enshrined in the ILO's 1998 Declaration on Fundamental Principles and Rights at Work.⁷ While there have been divergent views regarding the strategic significance of the Declaration's affirmation of four core labour rights, there is widespread consensus that it was designed to revitalize the ILO by "proclaiming the 'special significance' of fundamental rights for the achievement of other rights" (Maupain, 2005, pp. 460–461).⁸ As one of the core ILO principles, the elimination of discrimination in employment and occupation has also been the focus of three Global Reports as part of the follow-up to the Declaration (ILO, 2003, 2007 and 2011).⁹ With respect to the principle of non-discrimination, the Declaration incorporates the language of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111). Other ILO Conventions are also important to the affirmation of the elimination of discrimination as a core principle, most notably the Equal Remuneration Convention, 1951 (No. 100).¹⁰ Improving basic labour standards for those who work in some of the most marginalized and disadvantaged sectors of the economy is also of critical importance to securing greater equality and non-discrimination at work. To this end, sustained efforts have been made to increase the number of ratifications of existing Conventions – e.g. the Migrant Workers Supplementary

⁵ For a review of Vosko's (2010) *Managing the margins*, by Adelle Blackett, see *International Labour Review*, Vol. 150 (2011), No. 3–4, pp. 458–461.

⁶ For a general discussion of evolving conceptions of, and challenges to, labour law, see Davidov and Langille (2011). For a review of this book, see pp. 130–134 of this issue of the *International Labour Review*.

⁷ The full text of the Declaration was published in the *International Labour Review*, Vol. 137 (1998), No. 2, pp. 253–257 (also available at: http://www.ilo.org/public/libdoc/ilo/1998/98B09_234_engl.pdf [accessed 2 March 2012]).

⁸ For critiques of the 1998 Declaration on Fundamental Principles and Rights at Work, see Alston (2004 and 2005) and Alston and Heenan (2004). For a reply to these critiques, see Langille (2005a). See also Blackett (2007, pp. 225–230).

⁹ There is also a growing literature on the concept of discrimination in international labour law. See, for example, Hepple (2001) and "Special issue: Equality at work", in *International Labour Review*, Vol. 142 (2003), No. 4.

¹⁰ Conventions Nos. 100 and 111 entered into force on 23 May 1953 and 15 June 1960, respectively. Their full texts are available from <http://www.ilo.org/dyn/normlex/en/f?p=1000:12000:4103167827620808:::> [accessed 2 March 2012].

Provisions Convention, 1975 (No. 143) – and to adopt new Conventions, such as the recent Domestic Workers Convention, 2011 (No. 189).¹¹ Furthermore, in 1999, the ILO developed a new programmatic initiative entitled Decent Work.¹² This initiative highlighted four domains of engagement of critical importance to the ILO: employment, social protection, workers' rights and social dialogue (see Ghai, 2003).¹³ The Decent Work initiative has been applauded for recognizing “people on the periphery of formal systems of labour and social protection as requiring greater attention” (Vosko, 2004, p. 18). As a concept that transcends labour relations in the formal workplace, Decent Work is designed to provide a pathway to poverty reduction and the promotion of “equitable, inclusive and sustainable development”.¹⁴ Exploring the conceptual links between these developments can enhance our understanding of the dynamic complexities of redressing inequality at work.

The traditional approach: Equal treatment

If one begins with a visual map of inequality on a global scale, the traditional legal concept of the elimination of discrimination in employment and occupation – i.e. the first concentric circle – appears strikingly limited. Early legal conceptions of discrimination provided recourse for only a small part of the labour force – specifically those engaged in economically privileged work in formal employment relationships. Traditionally, legal protections against discrimination emerged to ensure that individuals from groups historically subjected to exclusion, prejudice and negative stereotyping were accorded equal treatment in accessing employment and occupational opportunities in paid work in the formal labour market. Anti-discrimination laws and policies thus prohibited differential treatment based on race, sex, national or ethnic origin and religion, provided that individuals could comply with the dominant standards and norms. More recently, these laws and practices have been extended to cover disability, sexual orientation and age in many jurisdictions.¹⁵

The equal treatment model of non-discrimination at work suffers from two important limitations. One limitation is its tendency to assist only a minority of individuals from historically disadvantaged groups – namely, those who can emulate dominant norms and assimilate into the institutional status quo.

¹¹ See also ILO (2010) and Blackett (2011a).

¹² On the ILO Decent Work Agenda see: <http://www.ilo.org/global/about-the-ilo/decent-work-agenda/lang--en/index.htm> [accessed 21 February 2012]; see also ILO (1999) and Vosko (2002).

¹³ The concept of “social dialogue” refers to processes of consultation, negotiation and democratic governance engaging workers, employers and governments.

¹⁴ See ILO Decent Work Agenda at <http://www.ilo.org/global/about-the-ilo/decent-work-agenda/lang--en/index.htm> [accessed 21 February 2012].

¹⁵ See, for example, the Americans with Disabilities Act, 42 U.S.C. (1990); Canadian Human Rights Act, R.S.C. 1985, c. H-6, s. 3; EC Council Directive 2000/78/EC of 27 November 2000 on establishing a general framework for equal treatment in employment and occupation (*Official Journal of the European Communities*, 2000, L 303, p. 12). See also the United Nations Convention on the Rights of Persons with Disabilities, adopted in December 2006.

For many years, feminist scholars have argued that such an approach to gender equality only provides access to historically male-dominated jobs and occupations to women who can act and be like men, raising the question of what equality means for diverse groups of women whose lives reflect sex-stereotyped realities (see, for example, MacKinnon, 1987, pp. 32–45). In other words, more privileged women can obtain better access to jobs as lawyers, doctors, judges, business executives, skilled tradespersons, but anti-discrimination law risks not addressing the concerns of women working in predominantly female sectors of the labour market. Similar critiques of the assimilationist underpinnings of the equal treatment model of non-discrimination have been made by critical race theorists, highlighting in particular how those experiencing multiple and intersecting forms of discrimination have had more difficulty meeting the exigencies of the equal treatment or “sameness” model.¹⁶ A second limitation of the traditional approach to discrimination in employment and occupation is its exclusive focus on the formal labour market. As such, it does not address discrimination in the informal economy, where some of the most vulnerable and marginalized workers are found (see Harriss-White, 2003; Sankaran, 2011). When one visualizes a map of the systemic, persistent and deepening global inequality at work, it is apparent that traditional anti-discrimination law focuses on only one small part of the problem.

To what extent does international labour law on the elimination of discrimination reflect the equal-treatment/formal-employment model? It has been suggested that the ILO’s early forays into the domain of equality were premised upon a traditional, formal-equality and formal-workplace vision of anti-discrimination law (see Vosko, 2004, pp. 15–19). The Discrimination (Employment and Occupation) Convention, 1958 (No. 111), was a response to unfair group-based patterns of differential treatment and exclusion. It sets out explicit protection against discrimination on the basis of “race, colour, sex, religion, political opinion, national extraction or social origin” (Article 1(1)(a)).¹⁷ By and large, the initial conception of the elimination of discrimination in employment and occupation meant giving similar treatment to all individuals according to their abilities and merits, rather than excluding some from this general principle or treating them differently on the basis of negative group-based stereotypes and prejudices. From its inception, however, Convention No. 111 did recognize exceptions to the equal treatment paradigm of non-discrimination. First, differential treatment could be justified when linked to the “inherent requirements of a job” (what we now refer to as bona fide occupational requirements).¹⁸ Second, it endorsed the use of “special measures” to meet the needs of “persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural

¹⁶ “The focus on the most privileged group members marginalizes those who are multiply-burdened and obscures claims that cannot be understood as resulting from discrete sources of discrimination” (Crenshaw, 1989, p. 140). For a recent discussion of intersectional/multiple discrimination, see Sheppard (2011).

¹⁷ Note the absence of disability and sexual orientation among the enumerated grounds.

¹⁸ Article 1(2) of Convention No. 111.

status, are generally recognised to require special protection and assistance”¹⁹. The language of “special measures” though providing express support for some positive initiatives, historically reinforced a “sameness” approach to anti-discrimination law. Rather than being understood as an integral dimension of equality, special measures were considered to be justifiable exceptions to equality. The inclusion of disablement as a justification for special measures when disability was not explicitly included among the prohibited grounds of discrimination was illustrative of this thinking. Initially, the language of special measures thus actually reinforced the unquestioned legitimacy of dominant norms. By allowing exceptions to the equal treatment rule of non-discrimination, the idea of special treatment reinforced stereotypes and prejudices about the “natural” inequality of individuals from groups in need of differential treatment.²⁰

Another important dimension of the ILO’s early work on equality rights has been equal remuneration for men and women. The Equal Remuneration Convention, 1951 (No. 100), provides protection in expansive terms, affirming entitlements to equal pay for work of equal value. Despite the expansive language used in this Convention, however, in the years immediately following its adoption, Convention No. 100 was understood in accordance with the more formal and procedural equal treatment model of anti-discrimination law, as was Convention No. 111; that is, it was primarily understood to secure equal pay for equal work (Flanagan, 1987, pp. 11–12). It was not until the 1970s that a broader interpretation of this Convention prompted concern over unequal pay across a segregated labour force — ushering in the modern era of engagement with the complexities of equal pay for work of equal value or comparable worth.²¹

Indirect discrimination: Contesting dominant norms

The first significant enlargement of the scope of anti-discrimination law occurred in response to the limitations of the equal treatment model. Using the mapping imagery, a second and larger concentric circle extended anti-discrimination law over a broader portion of the socio-economic phenomenon of inequality. Beginning in the 1970s, the concept of indirect discrimination emerged in various domestic jurisdictions (see Blumrosen, 1972, pp. 66–75; Sheppard, 2010, pp. 19–23). There was a shift from redressing discrete instances of differential ac-

¹⁹ Article 5 of Convention No. 111. For an analysis of the tensions between protective labour standards and equality, see Politakis (2001), who explains how gender-based restrictions on night work still provide essential protections in some contexts, though they are widely seen as inconsistent with gender equality provisions.

²⁰ Commenting on Convention No. 111, Vosko writes that “it allowed policies promoting both formal equality and protective measures, which often reinforce women’s subordination rather than securing equality of substance, to coexist” (2004, p. 16). In a similar vein, Hepple suggests that Convention No. 111 “embodies a notion of procedural justice which does not guarantee any particular outcome” (2001, p. 6). He goes on, however, to suggest it also contains elements of a substantive vision of equality (discussed below).

²¹ For a discussion of changes responding to occupational segregation by sex and the pay differential in the 1980s, see Hakim (2004, ch. 6).

cess to an unquestioned status quo, to questioning the ostensible neutrality and fairness of employment practices, standards, rules and norms. It became increasingly acknowledged that discrimination could occur unintentionally as a result of the disparate impact of apparently neutral employment rules and policies.

This theoretical shift allowed for two important types of expansion in the reach of anti-discrimination law. First, it allowed individuals to assert their entitlement to inclusion despite their differences from the dominant norm. In other words, assimilating into a dominant norm was no longer a prerequisite for inclusion. If apparently neutral policies and practices had negative impacts on historically excluded groups, such policies and practices were to be revised, or group differences accommodated to alleviate the disparate effects. Second, equality in the workplace became increasingly concerned with securing more equitable treatment for those employed in secondary labour markets.

In terms of remedies, indirect discrimination could be corrected in either of two ways. First, the rule, practice or policy at issue could be revised or eradicated in order to eliminate its discriminatory effects. Such a response meant that institutional norms would be challenged through anti-discrimination law – and replaced with more inclusive practices. Second, and alternatively, in cases where the rule, policy or practice was necessary to the effective operation of the job, the question of accommodation through differential treatment of the group(s) adversely affected would arise. A corollary of the principle of indirect discrimination, therefore, was the emergence of the duty to accommodate – a duty that extends to the point of undue hardship (see, for example, Day and Brodsky, 1996; Sheppard, 2001). In many cases, accommodation has become a critical means of securing inclusion in the workplace for individuals from religious minorities, persons with disabilities, and women. Understood as integral to substantive equality, accommodation is not conceptualized as an exception to non-discrimination or as special treatment.

As for the development of anti-discrimination law internationally, although Convention No. 111 appeared initially to focus on securing equal treatment in formal occupational and employment settings, conceptualizing differential treatment as exceptional and special, it also contained the seeds of a broader vision. While its definition of discrimination begins with a standard equal-treatment formulation including “any distinction, exclusion or preference”, it goes on to emphasize an *effects-based* measure for determining discrimination.²² This open-textured language has been interpreted more recently to support an enlarged definition of discrimination that includes both direct and indirect discrimination in international labour law (see Hepple, 2001; Nielsen, 1994, pp. 844–845).

In *Time for equality at work*, the ILO’s first Global Report on the elimination of discrimination in employment and occupation, the 1998 Declaration was interpreted to embrace a vision of non-discrimination measured in terms

²² Under Article 1(1)(a), “the term *discrimination* includes ... any distinction, exclusion or preference ... which *has the effect of nullifying or impairing* equality of opportunity or treatment in employment or occupation” (author’s emphasis).

of the substantive equality of outcomes, rather than merely the formal and procedural equality of individual treatment or equality of opportunity (see ILO, 2003; Tomei, 2003). Taking particular note of the disproportionate representation of women, ethnic minorities, migrant workers and the elderly in secondary labour markets, the Global Report highlighted the disquieting impact of *indirect* discrimination on vulnerable groups due, inter alia, to weaker social protection measures or the differential treatment of part-time and full-time workers (ILO, 2003, paras 57–60). Released in 2007, the ILO's second Global Report on this topic, *Equality at work: Tackling the challenges*, also defined discrimination broadly to include both direct and indirect discrimination, highlighting the need for better data collection methodologies and strategies to identify progress or lack of progress in remedying inequality (ILO, 2007, pp. 9 and 11–13). Most recently, the third Global Report again endorsed a vision of equality that embraces both direct and indirect discrimination (ILO, 2011).

Systemic discrimination: Affirmative action and transformative institutional change

Legal recognition of indirect discrimination paved the way for a further expansion of the reach of anti-discrimination law to the systemic or institutional level. While discrete policies, practices or rules may result in adverse effects and indirect discrimination, they are often manifestations of larger patterns of exclusion and inclusion that are deeply embedded in workplaces. In such contexts, discrimination is not an aberrant or exceptional phenomenon; it is a pervasive and systemic or structural problem. Though often associated with indirect discrimination, systemic discrimination also occurs when direct discrimination, involving the overt exclusion and unfair treatment of certain groups, becomes pervasive and an integral part of workplace cultures and institutional norms. Recognizing systemic or structural discrimination further expands the reach of anti-discrimination law from discrete and isolated problems of exclusion to broader, institution-wide problems. The ILO's second Global Report on equality defined "structural discrimination" as discrimination that is "inherent or institutionalized in social patterns, institutional structures and legal constructs that reflect and reproduce discriminatory practices and outcomes" (ILO, 2007, p. 9).

Like other areas of law, therefore, anti-discrimination law must address the complex task of regulating both individuals *and* institutions. Whereas the traditional, sameness-based vision of formal equality treats discrimination as an aberrant, anti-social act by a racist or chauvinistic individual that can be remedied retroactively through a legal complaints system, systemic discrimination requires new regulatory strategies. As explained by Justice Rosalie Abella in her Canadian Royal Commission Report, *Equality in Employment*, "[s]ystemic discrimination requires systemic remedies" (Abella, 1984, p. 9). It becomes necessary, therefore, to consider how to use legal norms and standards to change systems and institutions, rather than just altering individual behaviour. Susan

Sturm's important work on what she calls "second generation employment discrimination" also underscores the need to analyse the structural aspects of inequality at work and to develop innovative remedial approaches (Sturm, 2001 and 2006; see also Albiston, 2009). Proactive employment equity, positive action or affirmative action initiatives as well as public procurement policy engage an alternative approach to state regulation. Instead of being premised on a retroactive, command-and-control model of regulation, these policies are proactive and extend responsibility for identifying and redressing equality to non-state actors (see Sheppard, 2010, pp. 29–30).

Affirmative action, positive action or employment equity requires employers – in varying degrees of partnership with trade unions or employee representatives – to assess the sources and policies that result in discrimination in their workplaces and to develop strategies, goals and timetables for eliminating them. There is a range of definitions and understandings of the meaning and scope of these programmes. Some have defined affirmative action narrowly as group-based preferential treatment programmes to advance equity in the workplace (see Tomei, 2005, citing Faundez, 1994). Such a definition explains the tendency of many affirmative action programmes to focus on expediting access by underrepresented groups to an unchallenged institutional status quo. Through hiring and promotion initiatives that accord preferential treatment to individuals from historically underrepresented groups, employers endeavour to change the composition of the upper echelons of employment hierarchies, without challenging the hierarchies themselves. This focus on upward mobility explains traditional trade union reluctance to embrace affirmative action. Seen as fostering aspirations for managerial privilege rather than working-class solidarity, the very project of affirmative action seemed at odds with the historical objectives of the labour movement.

Increasingly, however, a broader conception of affirmative action has been articulated to include all proactive initiatives aimed at identifying and eliminating systemic discrimination. Pursuant to this broader vision, affirmative action or employment equity programmes include:

- identifying and revising apparently neutral rules and practices that disproportionately exclude individuals from historically disadvantaged groups;
- developing proactive initiatives that do not involve group-based preferences; and
- group-based preferences to expedite redressing the effects of historical and continuing discrimination.

This broader definition provides a basis for using affirmative action or employment equity programmes to promote structural and institutional transformation.²³ The preferential treatment dimensions of affirmative action expedite institutional change by preventing isolation and ensuring that a critical mass of historically excluded workers can play an active role in changing institutional

²³ For a discussion of alternative paradigms of employment equity, see Sheppard (2006).

norms and practices. Moreover, rather than assimilating into a workplace governed by standards and policies that privilege historically dominant groups, employment equity initiatives can begin a transformative process of re-imagining and revising traditional policies and practices at work. For example, rather than assuming that the ideal worker has no family responsibilities outside of the workplace, the workplace norm can assume significant familial obligations and organize workplace responsibilities accordingly. Drawing on relational conceptions of discrimination, inequality is no longer “located” in the individuals or groups labelled different from the dominant norm, but is instead linked to the ways in which social practices and choices construct exclusion and disadvantage (Minow, 1990). Based on such an understanding, affirmative action resonates more closely with the mandate and project of trade unions. Indeed, in unionized sectors of the economy, collective bargaining and representation are increasingly seen as integral to transformative change towards a more inclusive workplace.²⁴

Regardless of the definition adopted, the effectiveness of affirmative action or employment equity is closely linked to the extent to which there is effective public oversight and enforcement. Such initiatives therefore tend to be developed almost exclusively in large public and private workplaces, and function most effectively and transparently in unionized workplaces.²⁵ These constraints significantly limit the reach of proactive employment equity initiatives; clearly, they do not impact upon the inequalities experienced by those doing the most marginalized and precarious work. Procurement policies, though often similarly limited to large firms engaged in significant business and grants with the government, also extend to smaller contractors and businesses in some cases (McCrudden, 1998).

It is important to note that international labour law does not provide any clear definition of concepts such as affirmative action or employment equity. These terms are not used in international conventions. As noted above, the latter speak of “special measures” and “special temporary measures” instead. The Discrimination (Employment and Occupation) Convention, 1958 (No. 111), for example, provides in its Article 5 that “special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognised to require special protection or assistance, shall not be deemed to be discrimination”. Significantly, these grounds for special measures do not align with the grounds of discrimination prohibited under Article 1, i.e. “colour, sex, religion, political opinion, national extraction or social origin”. Although the language of the Convention is malleable and subject to interpretation, it appears that the special measures contemplated in Article 5 were initially considered protective measures to respond to biological, physiological or cultural differences. They were long-term measures to accommodate permanent differences between

²⁴ For an extended discussion of the links between collective bargaining and equality, see Blackett and Sheppard (2003).

²⁵ For a comparative review of employment equity and affirmative action initiatives, see Agócs (2002).

groups rather than short-term measures to redress a history of discrimination. Nevertheless, they do speak to an early recognition of the need for positive and proactive initiatives to redress exclusion and historical disadvantage.

Greater guidance is provided in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Elimination of Racial Discrimination (CERD), both of which expressly endorse both “special measures” and “special temporary measures”.²⁶ Special measures are endorsed in terms of a commitment to substantive equality that provides for differential treatment in the face of long-term different needs; and “special temporary measures” are considered to include affirmative action initiatives.²⁷ They recognize that proactive group-based initiatives are needed to secure substantive equality. In a 2002 report to the United Nations Commission on Human Rights’ Sub-Commission on the Promotion and Protection of Human Rights, a distinction was also made between “affirmative fairness or mobilization” and “measures of affirmative preference”.²⁸ Though this distinction further attests to the need for a broad definition of affirmative action, the Sub-Commission’s Special Rapporteur was careful to limit affirmative preferences to those that do not violate principles of non-discrimination, urging that special preferences only be accorded in situations of equal merit or qualifications.

There thus continues to be an unresolved ambiguity in international law about the appropriate scope and justificatory basis of affirmative action. For some, it is understood as “an extension of the notion of equality of opportunity and non-discrimination” (Hodges-Aeberhard, 1999, p. 247). In an interesting speech on affirmative action in international law, Justice Ruth Bader Ginsburg based her endorsement of affirmative action on the basic principles of equality enshrined in the Universal Declaration of Human Rights (Bader Ginsburg and Jones Merritt, 1999, pp. 282–284). For many, however, it is still understood as an exception rather than a concrete substantiation of equality, with considerable concerns articulated about the risk that preferential treatment programmes might undermine the rights of workers from more privileged groups (Bacchi, 2004, p. 146). Interestingly, the more affirmative action, positive action or employment equity focuses on a transformative project that changes exclusionary norms and practices, the less it needs to depend on special preferences. It becomes both more radical and less controversial.

The importance of institutional transformation in debates about affirmative action also resonates with a growing recognition of the connection between

²⁶ See CEDAW, Article 4; and CERD, Article 1(4).

²⁷ See United Nations: *Report of the Committee on the Elimination of Discrimination against Women, Thirtieth Session (12–30 January 2004), Annex I: General Recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures*, General Assembly, Fifty-ninth Session, A/59/38, New York, NY, 2004, pp. 80–81, paras 15–16.

²⁸ See Economic and Social Council, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights: *Prevention of discrimination: The concept and practice of affirmative action*, Final report submitted by Marc Bossuyt, Special Rapporteur, in accordance with Sub-Commission resolution 1998/5, E/CN.4/Sub.2/2002/21, 17 June 2002, Geneva, 2002, paras 72–80.

democratic governance at work and enhanced equality. Bob Hepple maintains that “the quality of regulation depends crucially on empowerment”, which he defines as “bringing into the regulatory process the experience and views of those directly affected” (Hepple, 2001, p. 17).²⁹ In the more precarious segments of the labour market, however, it is very difficult to institute democratic processes for transforming workplace relations. And to the extent that workplace inequities are deeply connected to patterns of inequality in the community, even significant institutional transformation of workplaces would not constitute a complete response to inequality at work.

Beyond the workplace: Confronting the larger structural dimensions of inequality

While the extension of the definition of employment discrimination to embrace institutionalized and systemic inequities is a significant and positive development, such an approach still retains a focus on the formal workplace as the locus of discrimination. The more innovative regulatory responses to systemic discrimination, including employment and pay equity, apply predominantly to, or only function effectively in, large public and private enterprises. Moreover, these practices operate most effectively in unionized workplaces, where transparency, accountability and an independent voice for workers are more likely to be protected. More generally, a workplace-based approach is of limited efficacy when the inequalities faced by workers are embedded in broader structural patterns of labour market inequality. To the extent that labour regulation tends to be employer-based, it is difficult to address structural inequities that transcend the control of one employer or one workplace. Regulation of labour markets and the structural conditions of the economy take us into the domain of the public regulation of labour standards and economic policy. Constitutional and international standards affirming protection against discrimination may be relied upon to challenge regulatory policies that have discriminatory effects on historically disadvantaged groups, and it is the positive duty of the State to counteract the market inequities at issue in such legal arguments. Anti-discrimination law is no longer just about how to regulate public and private employers; it is about how to create the socio-economic, community and labour market conditions for social equity.

Furthermore, in examining the structural dimensions of inequality and work, many scholars and labour rights advocates have insisted on an extended definition of work to take into account work done in the informal economy, and unpaid work in the home and community. Barbara Harris-White (2003, p. 461) emphasizes that “[l]aws forbidding discrimination at work reach a tiny minority of the workforce” since a large part of the economy – the informal economy

²⁹ Significantly, ILO Convention No. 111, in its Article 3, contemplates the development of methods aimed at achieving the elimination of discrimination with the “co-operation of employers’ and workers’ organizations and other appropriate bodies”.

– lies beyond regulation’s reach. With regard to unpaid work, Sandra Fredman (2000, p. 184) highlights the importance of rethinking the public–private divide to assess the interaction between family and paid work (see also Sheppard, 2005). Kerry Rittich has argued that “as long as the border between paid work and unpaid work is maintained in its traditional form, the stripped down, re-invented labour markets promise to create dependent and relatively impoverished workers, many of whom will continue to be women” (Rittich, 2002, p. 136).

Vosko (2004) has critiqued the limited approach often adopted in international labour law, which focuses on the “standard employment relationship” to the exclusion of the informal economy and precarious labour markets. In her view, both Convention No. 111 and its reiteration in the Declaration of 1998 are premised on the standard employment norm, thereby excluding the equality concerns of the most vulnerable and marginalized workers. In contrast, she points to the broader dimensions of the ILO’s Decent Work Agenda as an alternative paradigm for addressing fundamental issues of equity and work. Unlike the seemingly more limited scope of the Declaration, the Decent Work Agenda is aimed at improving “the conditions of all people, waged and unwaged, working in the formal and informal economy, through the expansion of labour and social protections” (Vosko, 2004, p. 18; on the broader scope of the Decent Work Agenda, see also Hepple, 2001, p. 11, citing Sen, 2000).

Despite the persuasiveness of Vosko’s critique of the restrictive language used in the Declaration – i.e. the “elimination of discrimination in employment and occupation” – it is significant that early interpretations of this core labour right have been expansive. Representative of the broad approach being adopted is the ILO’s (2003) Global Report, *Time for equality at work*. Not only is its title indicative of an expansive understanding of the problem of inequality, but the Report itself emphasizes that the “elimination of discrimination at work is central to social justice, which lies at the heart of the ILO’s mandate” (ILO, 2003, p. 1, para. 4). It embraces an expansive conception of non-discrimination and stresses the importance of inclusion at work to achieving equality of outcomes in society as a whole, calling the workplace “a strategic entry point to free society from discrimination” (ibid., p. 2, para. 11). The Report further maintains that the elimination of discrimination is integral to the concept of decent work, which is “founded on the notion of equal opportunities for all those who work or seek work and a living, whether as labourers, employers or self-employed, in the formal or the informal economy” (ibid., p. 1, para. 4). Equality at work is thus identified as “an indispensable part of any viable strategy for poverty reduction and sustainable economic development” (ibid.). The ILO, therefore, in articulating an expansive approach to equality at work, demonstrates aspirations that reinforce a convergence between anti-discrimination law, poverty eradication and sustainable economic development.³⁰ The ILO’s second Global Report on

³⁰ The United Kingdom’s Department for International Development (DFID), for example, maintains that the implementation of labour standards is central to the reduction of global poverty, and thus contributes to social, political and economic development (see DFID, 2004).

this topic reiterated a broad conception of equality, and included discussion of the plight of some of the most vulnerable categories of workers, such as migrant and domestic workers (see ILO, 2007, pp. 30–33). Returning to our imagery of a map, we see in the ILO’s approach an acknowledgement that anti-discrimination law should extend beyond the parameters of the formal workplace to reach into the community, the family and the informal economy. However, actually ensuring that effective law reform, social dialogue and policy change occur beyond the traditional workplace remains a significant challenge. The ILO’s third Global Report on equality reiterates the expansive view expressed in the earlier editions and concludes with a quote from the Declaration of Philadelphia to the effect that “all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity” (ILO, 2011, p. 70, para. 281).³¹

Connecting the local and the global: The international dynamics of discrimination

It is important that anti-discrimination law expand to take into account systemic discrimination, structural inequities, the informal economy and family work. Such an expanded vision would take us a considerable distance from the limited model focused on assimilation and individual workplaces by contextualizing work in its societal and community settings at the local and national levels. However, one final shift outward is needed to take us beyond the boundaries of the nation-State. Examining inequality at work through an international lens elucidates how group-based patterns of inequality in local labour markets are linked to structural inequalities in the global economy (see Blackett, 2007). A broader examination is also critical to the articulation of a more global conception of social and economic justice (see Sen, 1999). Globalization appears to have in fact further entrenched socio-economic inequities and restructured inequality in the workplace. According to Sylvia Walby, while knowledge-based economies privilege those with high levels of education, the “new flexibility and new forms of working” that are associated with globalization “can be precarious and poorly paid” (Walby, 2000, p. 814; see also Hepple, 2005, p. 3). Social inequality at work is being shaped by such developments, affecting not only class inequality, but also “the intersection of class, gender and ethnic relations” (Walby, 2000, p. 814). Moreover, many scholars have written about the feminization of labour in the global economy, emphasizing the need to question and challenge dominant assumptions underlying global labour market dynamics in

³¹ This principle of the 1944 Declaration of Philadelphia is also recalled in the Preamble to the Discrimination (Employment and Occupation) Convention, 1958 (No. 111). See Section II(a) of the *Declaration concerning the aims and purposes of the International Labour Organization (Declaration of Philadelphia)*, adopted on 10 May 1944 and annexed to the ILO Constitution, available at: <http://www.ilo.org/ilolex/english/iloconst.htm> [accessed 7 March 2012].

order to address structural inequalities and the needs of women (see Ben-Israel and Foubert, 2004, p. 95; Cornish, Faraday and Verma, 2006; Rittich, 2002; Vosko, 2004; Cholewinski, 2006). In light of the new global context, Ruth Ben-Israel and Petra Foubert have suggested that the traditional dual labour market concept “might not be adequate in view of the new types of discrimination facing a large part of the labour market” (Ben-Israel and Foubert, 2004, p. 354). As they explain, the primary labour market “relates to full time and tenured workers, usually enjoying a large spectrum of rights”; the secondary market “relates to precarious, atypical and peripheral workers ... accompanied by a very thin net of rights”. The third segment includes “structurally unemployed workers excluded from the labour market, and consequently, from society as well” (ibid.).

Attentiveness to the larger structural dimensions of inequality at work, both domestically and internationally, raises fundamental questions about how eliminating discrimination at work implicates national government policies on labour market and economic regulation, transnational labour law governance and fair trade policies. In her important theoretical work, Saskia Sassen emphasizes the “extent to which the global is embedded and filtered through the national” (Sassen, 2003, p. 28; see also Sassen-Koob, 1984; Craig and Lynk, 2006). National political channels provide a venue for citizens to demand accountability and democratic input into the effects of globalization even in the absence of international regulatory regimes or a global state. Beyond the nation-State, however, broader consideration of *global* inequalities at work does prompt concern over the development of effective international labour law (Hepple, 2005; Langille, 2005b).³² Many suggest the need for transnational governance – eloquently described by David Held as “cosmopolitan democracy” (Held, 1995, pp. 190–201; see also Weiss, 2011). In Held’s view, developing global mechanisms for governance will help to ensure “the accountability of sites of power beyond the current scope of democratic control” (loc. cit.). Such a global perspective raises critical questions about the capacity and responsibility of international institutions to promote effective transnational governance and social justice (Sen, 1999).

The identification of elimination of discrimination as one of the four fundamental principles in the ILO’s Declaration of 1998 and its expansive Decent Work Agenda have prompted increased scrutiny of equality rights in international labour law. While a considerable amount of international labour law has involved comparative consideration of the effectiveness of alternative national and local strategies for the elimination of discrimination, international labour law also requires an inquiry into the relationship between the conditions of inequality in different countries and regions of the world. This latter inquiry raises issues about the global workplace, international trade, migrant workers, capital flight and international socio-economic developments. More recently, the financial crisis has confirmed the relevance of a global focus. In the ILO’s third

³² That countries fail to ratify new labour conventions undermines credibility and legitimacy, while lack of information and data regarding compliance undermines efficacy. See National Research Council of the National Academies (2004).

Global Report on equality, the Organization stresses the need for all Governments – especially at a time of economic instability – to continue prioritizing action against discrimination, and not to lose sight of long-term equality goals in an effort to win short-term economic gains (ILO, 2011, pp. 5–9).

Conclusion: Convergence in international labour law

Our concentric circles trace the contours of an ever-widening conception of inequality at work and the limits of discrimination. As we expand the paradigms that shape our thinking about inequality at work, it remains important to understand how manifestations of socio-economic inequalities reveal group-based disparities – in terms of sex, race, national or ethnic origin, disability, social origin, political belief, religion and sexual orientation – and how those disparities are revealed in both the formal and informal sectors of the economy. At the same time, by attending to the inequities experienced by the most economically disadvantaged and marginalized groups in society, we will necessarily contribute to securing greater equality at work.³³ As Adelle Blackett writes, “[c]itizenship at work is reframed at the intersection of labour law and human rights law” (Blackett, 2011b, p. 434; see also Fraser, 2009, ch. 6). For as we enlarge our understanding of discrimination to embrace the systemic and structural dimensions of group-based inequalities, anti-discrimination law converges with other domains of international labour law, in the struggle for both the empowerment of workers and more equitable working and living conditions in an increasingly global economy.

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³³ For a discussion of this as a strategy for taking into account intersecting and overlapping discrimination, see Sheppard (2011, p. 29).

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