Discrimination and the World of Work in South Asia

(Draft)

Kamala Sankaran[1]

Discrimination at work affects a large variety of workers (howsoever designated), workplaces, and work practices/arrangements. Discrimination often takes various forms – of inequality of treatment across groups, unfair treatment to a group or individual, arbitrariness in the work environment, or equal treatment of groups but with disparate impacts due to factors outside the immediate work environment etc. Discrimination can occur at various points in the working life of an individual – at the time of education/training/skills development prior to recruitment; during recruitment; at work, with regard to working conditions such as hours of work, leave, pay, transfers, training for instance; trade union/collective rights; social security and welfare measures; and dismissal, termination, retirement. Formal legal structures acknowledge or create only some of the discriminatory conditions that affect an individual/group at work. Non-legal factors or other forms of non-formal regulation also play an important role in determining the levels of discrimination faced in the world of work, and these too constantly change as notions of equality, fairness, and discrimination acquire different meanings socially.

Any study of discrimination affecting working people in South Asia (SA) needs to map out the distinct legal and non-legal frameworks that apply to the different categories of workers/employees in order to understand the manner in which the law frames their rights, and hence discrimination, within the world of work.[2] The legal frameworks of many countries in SA have treated government employees as a distinct group and differentiated them from those working in the semi-public and private sectors (both formal and informal). While the latter groups generally fall within the scope of what is designated as 'labour law' in most of these countries, the employment relations of government employees are to a large extent constitutionally determined or governed by statutory rules made under delegated powers. Thus, for this group of government employees, it is often the constitutional law which operated as their 'labour law', within which their status and rights as employees are determined. This distinction owes its origins to the nature of the sovereign power exercised whilst under colonial rule, when the 'steel frame' was seen as pivotal to the empire. Rights flowing from the growing trade union movement viz., the rights to organise themselves into trade unions, the right to strike, and the right to collective bargaining were rarely granted to government employees. Where such rights were permitted they were confined to 'industrial' employees of the government restricted to those employed in the railways, postal and telecommunications departments, ordnance factories, hospitals and highways. Government employees such as those with the secretariats, ministries and departments, those in the police, armed forces and paramilitary forces were kept immune from the idea of 'workplace rights' flowing from a contract of employment. In these latter sectors the old master-servant law, as modified by constitutional principles (often termed as 'service law'), continues to guide employee policies in many of the countries in SA. While the distinction between government employees and 'industrial' employees has been dissolved in many countries, counties in SA continue to maintain a distinction between labour law and service law.

This paper examines the constitutional and legal provisions dealing with discrimination at work across the three broad categories of workers/employees outlines above. Part A examines the constitutional strategies to deal with diversity in SA, in order to understand how access to public

[1] Associate Professor, Faculty of Law, University of Delhi. Contact: kamala.sankaran@gmail.com. I am grateful for the Visiting South Asian Research Fellowship at the School of Interdisciplinary Area Studies, Oxford University in June-July, 2010 during which much of this paper was researched and written, and for the comments received on an earlier draft from Professor Barbara-Harriss-White. Errors remain my own.

[2] This paper will focus on discrimination within the legal framework.

employment was made available to different groups, and how the equality and non-discrimination provisions in the various constitutions accommodated diversity in public employment. Part B uses the ILO (and UN instruments) as the lens to examine how discrimination is perceived and dealt with within the private sector employment in the countries in the region. Part C deals with the far more vexed issue of how discrimination issues can be identified, made visible and addressed within the informal economy, given that this 'sector' which employs the lion's share of the workforce in almost all countries in SA often has no legislative policies dealing with conditions and working relations within it.

A. Constitutions in South Asia: Discrimination and affirmative action

Despite their differences, countries in SA have much in common. The sheer diversity of their populations with variation in terms of language, religion, caste or region is remarkable among the countries in SA. This section examines the extent to which the constitutions of the counties in SA have recognised and acknowledged this diversity and accommodated such differences within the constitutional and legal frame works. This is framed within a broader question of understanding how issues of discrimination and equal access to employment and livelihood are dealt with within individual countries in the region in order to understand if the particular issues of discrimination and the manner of their redressal have anything unique to offer to the ongoing global discussions of equality, discrimination and affirmative action.

The constitutions in the region are post- WWII constitutions, and were debated and drafted at a time when rights-talk had become fairly widespread. There has been a fair amount of borrowing across South Asian countries in the course of their constitutional development. Principles of constitutionalism were gaining ground, and together with experiments relating to federalism, decentralisation and (and much later, subsidiarity[3]), they left their mark on the forms of government and citizenship envisaged by the different constitutions created in the SA region.[4]

One of the ways in which constitutions in the region have sought to address differences has been through the principles of federalism. Creation of states and provinces along ethnic or linguistic lines seems to have been a fairly widely used strategy to give 'voice' to regional aspirations and also to create the necessary administrative mechanism capable of addressing issues of identity flowing from local movements for local autonomy. As Katherine Adeney notes, "Federations in ethnically divided societies can either exacerbate or contain conflict."[5] Federalism has traditionally been seen as a democracy-deepening constitutional strategy since it allows regional identities to find a space within institutional structures.[6] However, where there are federal units that are non-homogenous ethnically, pluri-national federalism does pose a problem regarding their long-term viability.[7]

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[3] The principle of subsidiarity now incorporated within the European Union opens up newer possibilities for the manner in which powers are allocated and utilised within a federal structure. See generally, George A. Bermann, Taking Subsidiarity Seriously: Federalism in the European Community and the United States, 94 *Colum. L. Rev*. 331 (1994) and Mark Tushnet, Federalism and Liberalism, 4 *Cardozo J. Int'l & Comp. L.* 329 (1996).

[4] Countries in the region have adopted several constitution(s) in this period: Bangladesh - 1972, India – 1950, Nepal – 1948, 1951, 1959 1962, 1990, 2007 (interim); Pakistan – 1956, 1962, 1973; Sri Lanka – 1948, 1972 and 1978.

[5] Katherine Adeney, The Limitations of Non-consociational Federalism: The Example of Pakistan, 8:1 *Ethnopolitics* 87–106 (2009) at p. 87.

[6] Douglas V. Verney, Federalism, Federative Systems, and Federation: The United States, Canada, and India, 25 *Publius, The Journal of Federalism* 81- 97 (1995); Carl J Friedrich, *Constitutional Government and Democracy* 188-227 (1968).

[7] See McGarry, John and Brendan O'Leary, Must Pluri-national Federations Fail?, 8: 1 *Ethnopolitics*, 5-25 (2009).

The other broad way in which these constitutions seek to address differences is through the enumeration of rights coupled with general non-discrimination provisions to further deepen the principle of equality; in some instances proceeding further to their accommodation through 'special provisions' for certain identified groups. Sometimes these devices are used together within structures of federalism in order to deepen the democratic aspirations of minorities within federal units or to address unevenness of across federal units within a country. The development of such interlocking 'special provisions' within federal structures, have the capacity to address both ethnic/caste/religious and/or linguistic issues and simultaneously geographical and regional imbalances. 'Consociational' forms of group representation within federal units has been a peculiar form of federalism within the South Asian region, and has served to increase the complexity of accommodating recognition of identities within a federal *and* affirmative action framework.

One of the important issues in drafting Constitutions in SA, the latest being the interim Constitution of Nepal (2007), has been the manner of acknowledging and accommodating differences based on ethnicity, religion, caste, language and region. Unlike earlier constitutions which emphasised the equality of all citizens and did not deal with group identities, the South Asian constitutions were perhaps the first to explicitly acknowledge the rich diversities in their population and create somewhat innovative strategies to deal with such difference. A variety of 'strategies' to recognise and deal with 'difference' have been adopted. Not all differences were acknowledged. Some differences amounted to discrimination, and were dealt with accordingly.[8] Differences were broadly dealt with in two ways: differences that resulted in egregious discrimination of certain groups were addressed by a non-discrimination provision that prohibited the state from discriminating along certain prohibited grounds. (The struggle to expand such a prohibition and make it applicable against members of civil society is an incomplete one across SA).

The enumeration of fundamental rights has become the standard practice subsequently adopted by other countries in the region while drafting their constitutions. Other strategies pursued by the constitutions were to 'recognise' difference and to acknowledge that such diversities existed without necessarily taking active measures to minimise such differences. In the case of the Indian Constitution for instance, the provision stating that each group had the right to reserve their distinct script, language or culture was one such response.

Pakistan

The recognition of ethnic and regional differences in the newly independent countries led to Pakistan and India adopting a federal form of a constitution from the very beginning. However, differences persisted in the manner of government formation. Unusual for a constitution that declared it federal, the Pakistan Constitution of 1956 had a unicameral national assembly. This Constitution itself came to be finally adopted after the First Constituent Assembly was dramatically dissolved in 1954.[9] Further, the number of seats in the house was equally divided between East and West Pakistan deliberately disregarding the need to have proportionality based on population, in the limitation of constituencies. Under the Constitution of 1956, only East and West Pakistan were recognised as provinces.[10] Provinces within West Pakistan were later created broadly along

[8] See for instances the legal strategies to deal with untouchability.

[9] For a good account of the early phases of Pakistani constitutional development, see Alan Gledhill, *Pakistan - The British Commonwealth: The Development of its Laws and Constitutions,* Volume 8, London, Stevens & Sons, 1967. Also see *Federation* v. *Tamizuddin* PLD 1955 FC 240.

[10] Article 1 of the 1956 Constitution stated: 1) Pakistan shall be a Federal Republic to be known as the Islamic Republic of Pakistan, and is hereinafter referred to as Pakistan.
(2)The territories shall comprise:-
(a) the territories of the Provinces of East Pakistan and West Pakistan;
(b) the territories of States which are in accession with or may accede to Pakistan;

ethnic/linguistic lines. By and large, state or provincial formation in India, Pakistan and Sri Lanka have been along ethnic/linguistic lines, based on earlier borders that existed within these countries under British rule. There were considerable debates over the vexed question of whether there ought to be separate or joint electorates for elections to the national assembly while also framing the 1962 and present 1973 Constitutions.

Following the eighth constitutional amendment of Pakistan in 1985, article 51 of the constitution provides for setting aside 10 seats in the national assembly for minority religious groups – Christians, Hindus, Sikhs, Buddhists, Parsis and also (controversially) Ahmadis.[11] The amendment also provided that members belonging to the minority communities were to be elected on the basis of separate electorates by direct and free vote unlike earlier where they were elected by members of the National Assembly.[12] The categorization of Ahmadis as non-Muslims has been a subject of frequent complaints to various UN bodies including the ILO. (Since this paper is focused on employment and work, I have ignored the use of affirmative action in legislative assembles.)

The ILO reports that by a Cabinet decision of 20 May 2009, the Pakistani Government introduced a 5 per cent quota for the employment of minorities in federal government employment.[13] This quota is to apply to any person who is "a non-Muslim" as defined in article 260(3)(b) of the Constitution ("a person belonging to the Christian, Hindu, Sikh, Buddhist or Parsi community, a person of the Quadiani Group or the Lahori Group who call themselves 'Ahmadis' or by any other name, or a Bahai, and a person belonging to any of the Scheduled Castes"). The ILO has for several years been monitoring the question of discrimination against Ahmadis and expressed concern at the adverse impact of blasphemy legislation used against this community. This has been the stand taken by other UN bodies.[14]

Article 25 of the Pakistan Constitution deals with provisions relating to equality. What is interesting is that the equal protection clause is not accompanied by a broad anti-discrimination prohibition by the State as is usually the case in other constitutions. Instead, article 25(2) states that there shall be no discrimination on grounds of sex alone. This is further developed in article 25(3) which provides that the state can make special provision for women and children. While there is no general article prohibiting discrimination by the state, in the specific area of government employment, article 27 of the Pakistan Constitution provides that no citizen otherwise qualified for appointment in the services

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(c) the territories which are under the administration of the Federation but are not included in either Provinces; and

(d) such other territories as may be included in Pakistan

Explanation: In the Constitution, the Province of East Pakistan shall mean the Province known immediately before the Constitution Day as the Province of East Bengal, and the Province of West Pakistan shall mean the Province of West Pakistan set up by the Establishment of West Pakistan Act, 1955.

[11] Rubya Mehdi, *The Islamization of the Law in Pakistan*, Nordic Institute of Asian Studies, Richmond, Surrey, Curzon Press 1994.

[12] Dr. Safdar Mahmood, *Studies in the Constitution of Pakistan-1973*, Lahore, Macmillan, 2000 at p. 151.

[13] See Report of CEACR, 80th Session, 2009 (Pakistan) citing Office Memorandum No. 4/15/94-R-2, dated 26 May 2009, of the Cabinet Secretariat's Establishment Division.

[14] For instance the ILO notes that "United Nations Special Rapporteur on the question of religious intolerance concluded in 1996 that provisions specifically applying to the Ahmadi minority were questionable, stressing that blasphemy legislation should not be discriminatory and should not give rise to abuse. The Special Rapporteur also recommended that no mention of religion should be included in passports and that the declaration mentioned above be deleted (E/CN.4/1996/95/Add.1, paragraphs 82 and 85). More recently, the Committee on the Elimination of Racial Discrimination expressed concern about the risk that blasphemy laws may be used in a discriminatory manner against minority groups (CERD/C/PAK/CO/20, paragraph 19). The Committee also notes that during the Universal Periodic Review of Pakistan under the auspices of the UN Human Rights Council, the Government announced that "specific steps are being considered to strengthen laws and procedures to reduce incidence of their abuse" (A/HRC/8/42/Add.1, 28 August 2008, paragraph 8)". See Report of the CEACR, 80th Session, 2009 (Pakistan).

of Pakistan shall be discriminated against in respect of any such appointment on the grounds only of race, religion, caste, sex, residence or place of birth. The article further permits the adequate reservation of posts for persons belonging to any class or area to secure their adequate representation in the services of Pakistan.

Utilizing the well-recognised constitutional principle that a classification carried out on a reasonable basis would not violate the equal protection clause, Pakistan has classified its population on the basis of geographical areas, local conditions, language to carry out affirmative action/special provisions for legislative representation or for obtaining government jobs. As a result the courts in Pakistan have upheld decisions which decided that communal electorates are not in violation of the equal protection clause; upheld the decision to make one language the medium of instruction in a university, also upheld the allocation of seats in universities to members of different minority communities in accordance with their proportion to the population, or fixed quotas for women candidates in representative bodies.[15]

The 1962 Constitution had held that no citizen otherwise qualified for appointment in the service of Pakistan shall be discriminated on the grounds only of race, religion, caste, sex, residence or place of birth. But the Constitution also stated that for 15 years commencing from 1964, posts may be reserved for persons belonging to any class or area to secure their adequate representation in the services of Pakistan, and that such reservation could be for either sex. (Fundamental Right No. 17). The Constitution also permitted that posts in provincial and local governments a residence qualification could be presented. Gledhill points out that unlike India there was no general equal opportunity clause for public employment. Instead, the matter was contained within a specific anti discrimination clause.[16]

The 1962 Constitution also abolished untouchability and its practise in any form declared to be an offence, much in the manner of the article 17 of the Indian Constitution earlier, and later the 1990 Nepal Constitution. The Principles of Policy (PP) of the Pakistan in 1956, 1962 and 1973 have maintained that legitimate rights and interest of minorities must be safeguarded and that they must be given due opportunity in the public services. The 1962 Constitution stated that the "underprivileged must be raised to equality with others and provinces must prepare schedules of under privileged *castes*, races, tribes and groups." (PP No. 5; emphasis supplied).

The recognition of caste in Islamic states such as Pakistan, and later Bangladesh, has always been a controversial one. Do such castes belong only to the minority Hindus or can such groups be recognised among the majority Muslims? This has been a difficult question to answer legally, if not sociologically. The Sachar Committe Report in India has officially acknowledged the existence of caste groups, including dalit-like, *arzals* within the Muslim community in India. The difficulties of permitting reservation for Muslims – both as a category under the more general 'other backward Class' category and as dalits has been commented upon.[17]

Reservation for scheduled castes (SC) in Pakistan had been based on the Government of India SC Order of 1936 based upon the GOI Act, 1935. In the 1956 Constitution two categories were made subject to special provisions in the form of quotas and relaxation – the SC and Backward class. Article 218 defined SC to mean those notified under the GOI Act, 1935, Fifth Schedule. Under the 1962 Constitution, the terms SC and backward class had been eliminated, and the term 'underprivileged castes' was introduced (Article 8, paras. 4 and 5). The government of Pakistan had issued a list of SC under the SC (Declaration) Order of 1957 which continued to operate under the

[15] For details see, Ahmer Fazeel, *The Constitution of the Islamic Republic of Pakistan*, Karachi/Lahore, Pakistan Law House, 1997.
[16] Gledhill, n. 9.
[17] See Kamala Sankaran, 'Issues before the Courts', 602 *Seminar* (Issue on India's Religious Minorities) (2009).

1962 Constitution.[18] The list of underprivileged castes issued in 1968 was held to be "not referable" to the SC list.[19]

In 1967 a notice was issued by the Central Public Service Commission which reserved 6 percent of posts for SC.[20] The Public Service Commission directed that 20% of posts were to be allotted on merit, and the remaining 80% posts were to be allotted as follows: East Pakistan – 40%; Areas of former Punjab and Bhawalpur – 23%; Karachi 2%; former Sindh, NWFP, Frontier Baloch and Azad Kashmir – 15%. Out of this quota, a quota of 6% for SC against the quota for the region was further carved out as indicated earlier. In a case dealing with a petitioner belonging to the Qaisrani tribe of Dera Ghazi Khan who wanted to appear for the CSP (Civil Services of Pakistan) examination and wanted to avail of the age relaxation permitted to SC, Buddhist community and tribes of NFWP, Baloch and tribal areas of Dera Ghazi Khan, the court held that only those persons who are permanent residents of these areas were eligible for age relaxation. It also held that the category of SC was referable only to Hindus. It described Hindus as follows: "It refers to those tribes and races of Hindus, who were previously very backward and depressed."[21] The court referred to the Scheduled Castes (Declaration) Ordinance, 1957 where the preamble clearly stated that "it was expedient to declare certain cases of non-Muslims to be scheduled castes for the purpose of the Constitution". Therefore the court held that a Muslim resident in the tribal areas of Dera Ghazi could not lay claim to a seat reserved for backward classes of non Muslims, called the SC. The category of SC was relatable to the 1957 order and was a central law, whereas the notification of 1963 related to underprivileged classes that are the caste, races and tribes belonging to the former tribal areas of West Pakistan and the two categories are distinct. Clearly, Pakistan has not accepted any category of SC within the Muslims.

The lack of special provision for SC has come in for adverse comment by UN bodies. The ILO has cited UN Committee on the Elimination of Racial Discrimination, which, has noted the continuation of "de facto segregation and discrimination against Dalits" in their enjoyment of economic, civil, political and social rights, and has noted the fact that there is no specific legislation prohibiting discrimination based on caste in Pakistan.[22]

Quotas in the civil services on the grounds of language have also been in force for some time now in Pakistan. What is interesting in the Pakistan case is that in order to deal with the over-representation of Punjabis in the civil services, a provincial quota in the central civil services was introduced. This initially increased the number of Bengalis in the elite CSP. Urdu as the official language also increased the presence of the Urdu speaking Mohajirs in the civil services. Subsequently, following the agitation in Sind for increased representation from that area reservation was granted for Karachi, and Sind. This is interesting because the agitation was fuelled by perceived discrimination against Sindhi-speakers, yet the remedy was regional quotas for Sind, and particularly Karachi. (This move also divided Sind into urban and rural areas which led to further strife). A

[18] Article 225(1) of the 1962 Constitution.

[19] *Abdul Hamid Khan* v. *Government of Pakistan*, PLD 1972 Lahore 336.

[20] Appendix IV of the Order stated:

…3. Reservation for the scheduled castes is made at the rate of 6 per cent. This reservation will count as part of the allotment of the provinces/area and will be reckoned against the quota of the province/area of origin of the scheduled caste candidate concerned.

4. Appointment to vacancies to be filled by candidates belonging to a particular community or province shall be made by the government in order of merit of the candidates belonging to that community or province area, provided that they have qualified in the examinations and are in all respects suitable for employment under the government. See *Abdul Hamid Khan* n. 19.

[21] Quoted in Dr. Nasim Hasan Shah, *Judgments on the Constitution, Rule of Law and Martial Law in Pakistan*, Karachi, Oxford University Press, 1993.

[22] Report of the CEACR, 80th Session, 2009 citing the CERD in its concluding observations of 4 March 2009. See CERD/C/PAK/CO/20, 4 March 2009, paragraph 21.

geographically based quota system results in other such as Punjabis also obtaining residence status and then claiming posts/seats reserved for Sind/Karachi.[23]

Article 27 of the Pakistani Constitution of 1973 initially provided a quota system for a period of 10 years, which was extended to 20 years in 1985 and by the 16th amendment of the Constitution in 1999 extended to 40 years. Thus the quota system will cease to operate in 2013 unless extended.[24] The Constitution provided for a reduced number of posts to be filled on merit from 20% to 10% and distributed the remaining directly-recruited posts as follows: Punjab – 50%; Sindh – 19% (Rural 11.4, Urban 7.6); NWFP - 11.5; Baluchistan - 3.5 %; Northern Areas and FATA – 4%; Azad Kashmir -2%.[25]

The quota system has also been challenged before the Federal Shariat Court which was set up by the eighth amendment.[26] The Shariat Court had to examine if the quotas created by the Sindh government were inconsistent with the injunctions of Islam that there should be no difference between individuals, ability and capability, mentally as well as physically. The Court declared the quota system repugnant to the injunctions of Islam and declared that they would cease to have effect unless brought in conformity with the injunction of Islam as noted by the Court.[27] This was also reiterated in another case before the Lahore High Court bench.[28]This was followed up after the 1997 elections by Prime Minister Nawaz Sharif declaring that quotas would be abolished. Yet the succeeding years saw amendments to the Constitution and the quota system brought back with some minor changes such as a new quota of 5 % for religious minorities announced in 2009.

Sri Lanka

Proposals to have a federal constitution with regional autonomy had been put forward since the 1920s and through the period of the Donoughmore Constitution (1931-47) but was not accepted by the various political forces in Sri Lanka.[29] Unlike other countries in the region, Sri Lanka adopted a unitary Constitution in 1947 (Soulberry Constitution) which remained its leitmotif through later constitutions of 1972 and 1978. As a result of the Indo-Sri Lanka accord of 1987, a limited amount of devolution was permitted under the thirteenth amendment to cater for Tamil demands for autonomy.

The Soulberry Constitution provided for a Senate, half of whose members were to be elected the remaining appointed by the Governor-general. The delimitation commission was authorised to create electoral districts with multi-member constituencies in regions with a substantial minority population so as to give effective representation to their interests. More importantly, section 29 made it unconstitutional to impose liabilities or restrictions on, or confer any advantages to any particular groups or religion which is not conferred on other groups.[30] The Sri Lankan Constitution (the Soulberry Constitution of 1947) did not adopt a written bill of rights (influenced no doubt by Sir Ivor Jennings and his key role in its drafting), unlike the slightly later Indian Constitution of 1950.

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[23] See Charles H. Kennedy, Policies of Ethnic Preference in Pakistan, *Asian Survey*, Vol. 24, No. 6 (Jun., 1984), pp. 688-703 generally.

[24] Justice Fazal Karim, *Judicial Review of Public Actions*, Karachi, Pakistan Law House, 2006.

[25] Mohammad Waseem, Affirmative Action Policies in Pakistan, XV:2 *Ethnic Studies Report* (1997).

[26] This court comprises Muslim judges of the Supreme Court including the Chief Judges who are knowledgeable about Islamic law.

[27] *Nusrat Baig Mirza* v. *The Government of Pakistan* PLD 1992, Federal Shariat Court 412, cited in Justice Syed Shabbar Raza Rizvi, *Constitutional Law of Pakistan: Text, Case Law and Analytical Commentary*, 2nd Rev.Edn, Lahore, Vanguard, 2000.

[28] *Dr. Shaheena Nusrat* v. *The Province of Punjab*, 1997 CLC 1308 Lahore, cited in Syed Shabbar Raza Rizvi, ibid.

[29] Sunil Bastian, 'The Mechanics of Devolution' in Dinusha Panditaratne and Pradeep Ratnam (eds.), *The Draft Constitution of Sri Lanka: Critical Aspects*, Colombo, Law and Society Trust, 2008

[30] Sunil Bastian, ibid.

The Constitution of the Democratic Socialist Republic of Sri Lanka of 1972 gave a 'foremost place' to Buddhism and cast a duty on the State to foster Buddhism. Sinhala was declared to be the official language of Sri Lanka. As a commentator noted, the Sinhala national identity of an "Aryan, Buddhist, Sinhalese speaking nation" was developed in opposition to a "Tamil, Hindu, Dravidian" minority.[31] Article 9 of the 1978 Constitution accords Buddhism "the foremost place", implicitly acknowledges that the majority of Sri Lankans profess Buddhist faith, without however giving Buddhism the status of the state religion. At the same time freedom of religion is granted to all religions. In the absence of an omnibus anti-discrimination law (as we discuss in section B below) affecting public and private relations between persons, the ILO has asked for clarifications from the Government of Sri Lanka regarding the extent to which both Buddhists and non-Buddhists are protected in practice against direct and indirect discrimination based on religion in employment and occupation.[32]

Interestingly, due to the development of ethnic tensions, differences based on caste did not play such a prominent role in Sri Lankan constitutional and legal development. The caste system was well-entrenched within both the Sinhala and Tamils communities historically. However at the time o framing the Soulberry Constitution, the preeminent position of the Buddhists in the country would not permit an acknowledgment of the caste system in the Constitution.[33] Yet caste calculations were central to Sri Lankan electoral politics.[34]

The existence of caste-based discrimination has been recognised by 1978 Constitution of Sri Lanka. Article 12(a) of the Constitution prohibits caste-based discrimination. This aspect is reflected in the Prevention of Social Disabilities Act, 1957, as amended in 1971, which declares caste-based discrimination an offence with respect to access to shops, public eating houses and hostels, public wells, hairdressing salons, laundries, cemeteries, places of worship and for the purposes of education and employment.[35]

Equal treatment of various ethnic groups based on the pre-Constitutional compact of 1943-44 to recognise both Sinhalese and Tamil as languages was sought to be ensured. This parity was overturned by the 'Sinhala Only' campaign of the 1950s. The result of the 'Sinhala Only' campaign resulted in a sharp decrease of Tamil students to fit into the quotas allotted to them. Thus, while in 1970 the recruitment of Tamils in the Ceylon Administrative Service was 5%, by the late seventies it had dropped even further. In university admissions the numbers of Tamil students in engineering and medical faculties fell from over seventy percent to 16.3% and 25.9 % respectively.[36] Subsequently, the ethnic based quota system was amended with a district quota system, with around 15 per cent reserved for backward districts. (This shift from a ethnic based system to a geographical system is more similar to the form of affirmative action (AA) practised within Pakistan, where seats/posts are reserved for Sindh and not for Sindhis). The use of Tamil, in accordance with the Tamil Language (Special Provisions) Act, 1958 allowed a Tamil student in a government school to be instructed in Tamil, write the public service exam in Tamil with a requirement to acquire a working knowledge of Sinhala within a given period of joining the civil services.

As a result of the growing mobilisation by Tamils for recognition of their ethnic rights, the Constitution of 1978 gave Tamil the status of a national language. Further, the earlier constitution which granted fundamental rights to citizens alone, had included Sri Lankan Tamils but excluded up country Tamils (mainly in the north and east of the island). The 1978 Constitution extended

[31] Radhika Coomarswamy, *Sri Lanka: The Crisis of the Anglo-American Constitutional Traditions in a Developing Society*, New Delhi, Vikas Publishing House, 1984, p. 15.
[32] Report of the CEACR, 77th Session, 2006, Direct Request (Sri Lanka).
[33] See Radhika Coomaraswmay, n. 31.
[34] See Janice Jiggins, *Caste and Family in the Politics of the Sinhalese 1947-1976*, Cambridge, Cambridge University Press, 1979.
[35] CEACR 79th Session, 2008.
[36] Radhika Coormaswamy, n. 31.

fundamental rights to also 'persons', with the result such "Indian Tamils" also could potentially be covered. The 1987 India-Sri Lanka accord reiterated that the northern and eastern territories were integral part of the habitation of Sri Lankan Tamils.[37] The Thirteenth Amendment to the Sri Lankan Constitution carried out in 1987 after the Accord detailed devolution of powers to the Provincial Councils However, Parliament retained its override powers with two-thirds override, during emergencies or to give effect to a treaty.[38]

Under the 1978 Constitution, there is protection for citizens against discrimination on the grounds of "race, religion, language, caste, sex, political opinion, place of birth or any of such grounds" (article 12), guaranteeing the freedom to engage in employment and occupation (article 14) and guaranteeing the right of every person to apply to the Supreme Court in respect of violations of these rights by the State (article 17). While dealing with the question of discrimination faced by those of Indian-origin, the ILO has noted that "the Constitutional guarantees against discrimination only appear to cover citizens and do not prohibit discrimination on the grounds of colour or national extraction."[39] Despite the adoption of the Grant of Citizenship to Persons of Indian Origin Act, No. 35/2003, and the Act to Repeal the Indian Immigrant Labour Ordinance No. 23/1993 (Chapter 132), No. 18/2006, the ILO has advised the government of Sri Lanka to introduce effective non-discrimination provision in the labour law to prohibit discrimination that would apply to all, whether they be citizens or non-citizens which is the requirement of ILO Convention No. 111 that Sri Lanka has ratified.

The constitutionality of an ethnic quota system in promotion in government employment has been considered by the courts in Sri Lanka. Promotion in government services was governed by the a strict ethnic quota of Sinhalese 75%, Tamils 12.7%, persons of Indian origin 5.5% and Muslims 8% according to circulars issued by the government.[40] This was struck down as unconstitutional on the ground that the cadre of government employees being considered for promotion was a single class and none could be denied equality of opportunity for being considered for promotion. The court felt that differences in ethnicity, religion, language did not by themselves render people unequal unless there was proof of special circumstances which was not established in this case.[41]

Nepal

The past sixty odd years has seen all the countries in SA adopt constitutions. Nepal is the country that has seen the maximum number of constitutions, six, formulated in the past sixty years.[42] The first few constitutions did not make any special provision for marginalised groups. The constitution of 1990 drafted after the popular movement overthrow the Panchayat regime of the of the fifties and sixties, made some crucial departures from the earlier constitutions. In a departure from the earlier Panchayat regime, where all diversities were ignored and a pan-Nepali identity encouraged[43], the 1990 Constitution recognised to a limited extent the diversity of the population of Nepal. Untouchability was abolished and the right to equality was re-asserted. Subsequent years have seen

[37] Sunil Bastian, n. 29.

[38] Rohan Edrisinha and Jayadeva Uyangoda, *Essays on Constitutional Reform*, Colombo, Centre for Policy Research and Analysis, University of Colombo, 1995.

[39] Report of the CEACR, 79th Session, 2008 (Sri Lanka).

[40] *Ramupillai* v. *Minister for Public Administration, Provincial Councils and Home Affairs* (1991) 1 Sri. LR 11.

[41] Jeyampathy Wikramaratne, *Fundamental Rights in Sri Lanka*, New Delhi, Navrang, 1996 at p. 228.

[42] For details of the six constitutions of 1948, 1951, 1958, 1962, 1990 and now the interim constitution of 2007, see variously Hari P. Bhattarai, 'Inclusive and Participatory Constitution Making' in Hari P. Bhattarai and Jhalak Subedi (eds.), *Democratic Constitution Making: Experiences from Nepal, Kenya, South Africa, Sri Lanka*, Kathmandu, Nepal South Asia Center, 2007; David N. Gellner, Democracy in Nepal: Four Models 576 *Seminar* 50-56 (2007)

[43] See David N. Gellner, Caste, Ethnicity and Inequality in Nepal, *Economic and Political Weekly* 1823-28 (2007).

the courts use such non-discrimination provision to hold that dalits have rights to enter Hindu temples and holding the construction of separate wells and taps for dalits as unconstitutional.[44] However, Khas-Nepali was declared to be an official language[45] and 'language' as a category was not recognised as a basis for discrimination. We can note that all the other countries in SA also do not make language a ground for non-discrimination, particularly in public employment.[46]

The 1990 Constitution declared that the State shall pursue a policy which will help to promote the interests of the economically and socially backward groups and communities by making special provisions with regard to their education, health and employment (26.10). Nepal has 102 distinct ethnic and caste groups, 92 living languages and eight major religions.[47] In 2003, the government declared reservations for dalits, indigenous nationalities and women in the civil service to the extent of 10, 10 and 20 percent respectively.[48] Nepal recognises the term 'adivasi janjati' (indigenous nationalities) and passed the Nepal Federation for the Development of Indigenous Nationalities (NFDIN) Act, 2002. [49] Nepal is one of the first countries to ratify ILO Convention No. 169 on the rights of indigenous people. The Interim Constitution of 2007 states that 'No discrimination shall be made against any citizen in the application of general laws on grounds of religion, race, sex, caste, tribe, origin, language or ideological conviction or any of these'. It also permits the states by law to make special provisions for law for the protection, empowerment or advancement of the interests of women, Dalit, indigenous ethnic tribes, Madeshi, or peasants, labourers or those who belong to a class which is economically, socially or culturally backward and children, the aged, disabled and those who are physically or mentally incapacitated (Art. 13). The extent of quotas/special provisions that the new Constitution and government of Nepal will bring remains unclear.

Bangladesh

Equal opportunity for all citizens in respect of employment or office in the service of the republic irrespective of religion, race, caste, sex or place of birth has been clearly proclaimed in the Bangladesh Constitution.[50] Bangladesh has chosen to reserve seats only for women in legislative bodies. There are 30 reserved seats for women in Parliament and local bodies.[51] The Article 28(4) of the Constitution provides scope for affirmative action in favour of the 'backward section of citizens'. It is reported that there is 5% tribal quota for the ethnic minorities, and that the total number of such candidates from religious and ethnic minorities in the civil services amounts to10.67% of the total. There is also some reservation for freedom fighters (and their children). [52] There is also a 10%

[44] Elisabeth Wickeri No Justice, No Peace: Conflict, Socio-Economic Rights, and the New Constitution In Nepal, 2 *Drexel Law Review* (2010)**.**

[45] Knowledge of Khas-Nepali was also a necessary requirement for acquisition of citizenship by foreigners. Madhesis who had got citizenship certificates under an earlier regime also had difficulties to establish citizenship. See Mahendra Lawoti, 'Constitution as a source of Exclusion: An Overview of the 1990 Constitution' in Hari P. Bhattarai and Jhalak Subedi (eds.), *Democratic Constitution making: Experiences from Nepal, Kenya, South Africa, Sri Lanka,* Kathmandu, Nepal South Asia Center, 2007.

[46] See Mahendra Lawoti, ibid, particularly for other aspects of discrimination along religious, and ethnic lines.

[47] Hari P. Bhattarai, 'Making an inclusive Constitution in a Plural State: Issues of Identity and Representation', in Hari P. Bhattarai and Jhalak Subedi (eds.), *Democratic Constitution making: Experiences from Nepal, Kenya, South Africa, Sri Lanka*, Kathmandu, Nepal South Asia Center, 2007.

[48] Mahendra Lawoti, ibid.

[49] Townsend Middleton, Sara Shneiderman Reservations, Federalism and the Politics of Recognition in Nepal, *Economic and Political Weekly*, May 10, 2008.

[50] *The Constitution of Bangladesh,* Article 29 (3).

[51] CEDAWA/52/38/Rev.1 (Part II, paras. 422-464). Available at http://sim.law.uu.nl/SIM/CaseLaw/UNCom.nsf/804bb175b68baaf7c125667f004cb333/20ad66e0f66dece7c125663c00343b36?OpenDocument .

[52]Kamal Uddin Ahmed, Quota system for civil service available at <http://www.thedailystar.net/story.php?nid=46159> accessed 7 January 2011 .

quota for women in the civil services. In addition to their recruitment on merit, 10 per cent of officers' posts and 15 per cent of staff positions at the entry level are reserved for women. The age limit for women to be eligible for entry to a government job is 30 years, whereas it is 27 years for men.[53] A study notes that the percentage of women in the civil services has been increasing over time while that of minorities has dropped since 1990. [54] All these quotas operate within the limits set for recruitment from each particular district. Thus, the cap placed on recruitment of women on the basis of each district has come in for adverse comments by women's groups reporting to the CEDAW Committee of the UN. [55]

India

India has had the oldest history in the world of using quotas and affirmative action to increase the presence of certain castes and communities in government service. Given the diversity of the Indian population, with identities based not only on castes and tribes, but also on religious, linguistic, and cultural differences, the Constitution developed a multi-pronged conception of equality. Based upon the principle of providing all persons "equality before the law" and "equal protection of the law"(Art. 14), it went on to declare that the State could not discriminate against any citizen only on the basis of caste, sex, religion, race, place of birth or any of them (Art. 15(1)), with a further elaboration that all citizens have equality of opportunity for all citizens in matters relating to employment or appointment or office under the State (Art. 16(1)) . Non-discrimination and equality of opportunity have been seen as means to ensure diversity in public employment and for ensuring the enjoyment of diverse cultural rights of religious and linguistic minorities.[56] This was further strengthened by the provision ensuring the freedom of religion. The Constitution of India, 1950 reserves seats in government jobs for backward classes of citizens which in the opinion of the state is not *adequately* represented in government services. The backward classes are deemed to comprise Scheduled Castes (SCs), Scheduled Tribes (STs) and Other Backward Classes (OBCs). The Constitution also permits the state to make special provisions in all policy related fields for socially and educationally backward classes (SEBCs), women and children. The newly adopted Constitution of 1950 also set aside certain electoral seats in the parliament and state-level legislatures, for the scheduled castes and scheduled tribes alone, in *proportion* to their presence in the population. The criteria for the identification of social backwardness are worked out in great detail for each state and the country as a whole, based on empirical studies. In the initial cases following the adoption of the Constitution, the courts had held that Article 16(4) providing for reservations is by way of a proviso or an exception to Article 16(1) ensuring equality of opportunity in government posts. This was the basis for the court to hold that reservations had to be within a reasonable limit and not to exceed 50 per cent of the posts or seats since this would negate the primary provision concerning equality of

[53] Report of the CEACR, 69th Session, 1998. The Report notes that, women constituted 7 per cent of gazetted officers and 7.4 per cent of other posts.

[54] Transparency International Bangladesh, Bangladesh Public Service Commission: A Diagnostic Study, March 2007. Available at <http://www.ti-bangladesh.org/research/Full_BPSC_eng.pdf> accessed on 7 January, 2011.

[55] Bangladesh Mahila Parishad, Bangladesh National Women Lawyers Association and Naripokkho, A Commentary on Bangladesh's Combined Third and Fourth Periodic Report for the Members of the United Nations Committee on the Elimination of Discrimination Against Women, available at http://www1.umn.edu/humanrts/iwraw/shadow/bangladeshreport.htm.

[56] There is a parallel set of provisions dealing with rights of tribal persons – some of which overlap with the affirmative action provisions discussed below, and others dealing with the administrative structures developed for tribal dominated areas that overlay upon the federal structures of the Constitution. It is beyond the scope of this chapter to discuss this aspect of the Constitution that no doubt, has an important bearing on both social inclusion and diversity.

opportunity.[57] Exceptional circumstances could however justify quotas that cross the 50 percent limit of posts/seats.

The effect of these provisions in government employment has been problematic. The government has reported that as of 1 January 2006 persons who belong to the schedules castes, (who account for 16.23 per cent of the population according to the Eleventh Five-Year Plan (2007–12)), were represented in central government services as follows: 13 per cent in group A; 14.5 per cent in group B; 16.4 per cent in group C; and 18.3 per cent in group D (excluding sweepers).[58] Quotas have not necessarily led to equality of resulting in the representation of all marginalised groups within the government service. Reservation measures for SCs, STs, OBC, and women have been introduced at varying times and in varying degrees over the last six decades. Most of the constitutional challenges have centred around criteria for identification of beneficiaries and the extent of reservations that are permissible.

Issues of caste, region/ethnicity and language have been the most significant grounds of discrimination and, therefore, special provisions/reservations/ affirmative action for government employees in the region. While constitution in the region acknowledge that discrimination based on religion, sex, residence, caste are not permissible, language has received much less attention in the law though it has been an emotive issue across the region. The non-enumeration of language as a constitutionally recognised ground of discrimination is a common thread which cuts across all SA countries. This non-recognition of language as a ground for ensuring equal opportunity in government jobs has important implications for the composition of public employment in all the countries in the region. Recruitment for these government jobs may be done on the basis of one or selected languages only, often privileging those languages designated as national or official languages. This immediately places those language-speakers who are not so designated at a disadvantage in such entrance/eligibility tests, interviews etc. The existence of quotas for selected regions, as in Pakistan, does not completely erase the initial discrimination on the basis of language since the existence of quotas my not adequately compensate the discrimination faced by those sections of the population speaking a 'non-recognised' language in their access to education, facilities vis-à-vis access to government services, access to higher education and so forth. Thus, language policy has an important impact of the manner and extent to which recruitment and eventual composition of public employment is constructed.

The use of quotas as a substantive equality measure to counter discrimination based on religion, region/ethnicity/sex or residence has led to widespread debate in the region. Baxi has noted that social quota systems are "in fact efficient and expensive means of social control".[59] The question whether these quotas have had the desired effect is a difficult one to answer given the lack of long-term studies tracking these aspects in the region. There is also concern over the deepening of identities and hostility that such measure engender, the relatively small numbers of persons who can benefit, given that government jobs, which spell certain levels of employment and income security are very rare in a region where more than ninety percent o of the work force confront precarious and informal types of employment.

B: Dealing with Discrimination under Labour Law

Most countries in SA do not have a general law dealing with discrimination within both the public and private employment. Constitutional provisions dealing with equality and non-discrimination in

[57] For details see Kamala Sankaran, 'Towards Inclusion and Diversity: India's Experience with Affirmative Action' in Ockert Dupper and Christoph Garbers (eds.) *Equality in the Workplace,* Cape Town, Juta, 2010.
[58] See Report of the CEACR, 80th Session, 2009.
[59] Upendra Baxi, 'Legislative Reservations for Social Justice: Some Thoughts on India's Unique Experience', quoted by Radhika Coomaraswamy, n. 31 at p. 78.

these countries usually apply to the State, and only rarely extend to private employers/persons. The ILO in dealing with discrimination in the world of work has had occasion to comment on this aspect. *Articles 1(1)(a)* and *1(1)(b)* of the ILO Convention No. 111 prohibit discrimination in employment and occupation based on race, colour, sex, religion, political opinion, national extraction or social origin, and any other ground determined after consultations with workers' and employers' organizations.

The labour laws of the region normally only refer to the category 'worker' and in some instances such as provision dealing with hours of work, safety, weights, entitlement to leave make a distinction between workers on the basis of sex. Several conditions of work such as days off, leave, weekly holiday are determined by the law or through the collective agreements entered with by the unions. With a heterogonous population, the trade unions are normally dominated by the majority group and this may then reflect the choice of holidays and the work time mutually agreed upon. Some provisions of the labour law could make a distinction between citizen and noncitizens such as the relating to right to employment upon retrenchment being offered only to citizens under the amendments to the Indian Industrial Disputes Act, 1947 in 1964. Other than such examples, most of the laws, at least on paper, do not discriminate against migrants. Gender-based discrimination is often addressed in the laws when they provide for equal pay for equal work for men and women and prohibit discrimination in the recruitment, promotion or transfer of women workers as in the case of the Equal Remuneration Act, 1976 of India. It is more difficult to deal with indirect discrimination that results in occupational segregation by gender. Differences in education, skills and social mores contribute to more socially embedded forms of discrimination that are not just confined to the workplace. Regular reporting and surveys conducted by UN bodies based on the social, political and economic features of every country address these underlying aspects of discrimination far more than a mere survey of labour law provisions. Increasingly the ILO bodies refer to UN reports and other socio-economic data to monitor compliance with ILO Conventions.

The country in the region that has most recently revamped its labour law – Bangladesh – does not provide for a general anti-discrimination provision in its Labour Act, 2006. Such a provision would need to comply with all aspects of employment and occupation (including access to vocational training, access to employment and to particular occupations, and terms and conditions of employment, including advancement and promotion) required under the ILO Convention No. 111. [60] Interestingly, the method of monitoring compliance with ILO Convention by the ILO supervisory bodies is not restricted to merely looking at legislative provision but assessing the nature of the labour market in its member States. Thus for instance, using labour market data in the Labour Force Survey 2005–06 published by the Bangladesh Bureau of Statistics,, the ILO had noticed a slight increase in the labour force participation rates of women, due mainly to their increase in a few female-dominated sectors, coupled together with a decline in the formal sector. For instance earlier reports of the CEACR had noted that women workers in Bangladesh were concentrated in industries such as the construction industry (as manual labourers), the manufacturing industry and the export-oriented labour-intensive industry, that employs unskilled and low-paid labour. A comment by the government in its report to the ILO that "garment industry employs mostly women due to the nature of jobs, which suit them" came in for notice, and the need for the "Government to consider undertaking positive measures in order to enhance women's training, skill development and access to jobs in different sectors of activity".[61] A fall out of this sort of approach is seen in the Bangladesh Employers' Association (BEA), which in cooperation with the ILO, undertaken a project for "the Promotion of Women in Private Sector Activities through Employers' Organizations", which is

[60] See for instance comments of the Committee of Experts on the Application of Conventions and Recommendations (CEACR) on its comments on the application of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) in Bangladesh in 2008.

[61] Report of the CEACR, 73rd Session, 2002 at para. 5.

intended to increase the capacity of employers' organizations to contribute to equal opportunity policies and guidelines and to undertake gender-based training for women

The ILO also uses other policy documents to monitor the extent of compliance/non-compliance with ratified Conventions. The National Strategy for Accelerated Poverty Reduction 2005 (Bangladesh) acknowledges that discrimination based on social origin exists when it states that "although in Bangladesh there is no caste system per se, these groups are treated the way lower castes are treated as untouchables in a caste system."[62] Discrimination based on bases akin to caste as well the treatment of tribal persons from the Chittagong Hill Tracts is closely monitored given that the Convention requires the state to ensure equality of opportunity and treatment to tribal peoples and for groups irrespective of tribal origin. In the case of India the ILO has regularly monitored the implementation of the Protection of Civil Rights Act, 1955, the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, and the Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993 and related policy initiatives such as the National Action Plan for the Total Eradication of Manual Scavenging. Labour market discrimination against women is also monitored and the ILO has noted that new licenses are not granted to industries that do not have standing orders in place to deal with sexual harassment.

Pakistan is in the process of revamping its labour laws and the ILO has advised it to include in its draft Employment and Service Conditions Act, 2009 a provision prohibiting discrimination under the seven heads indicated by Convention No. 111, and pointed out that discrimination on the grounds of social origin would also include caste. Labour force participation in Pakistan is adverse for women. The ILO notes that according to the Labour Force Survey 2007/2008, the labour force participation rate (refined) was 69.5 per cent for men and 19.6 per cent for women, and that the figures for 2001–02 were 70.3 per cent for men and 14.4 per cent for women.[63] The ILO also notes that between 2001–02 and 2007–08, that the percentages of women who were employees and own-account workers "significantly decreased, combined with a gradual increase of women in the category of unpaid family workers (from 46.9 to 65 per cent)" and that women confined to largely unskilled occupations or skilled agricultural work.

The lack of adequate protection for workers in the Export Processing Zones (EPZs), Special Economic Zones (SEZs) and Special Industrial Zones (SIZs) has been an important site for discrimination against workers in SA. This discrimination is based on unequal treatment vis-à-vis other workers and not for any identity based on religion, caste or ethnicity. The choice of an export-led industrialization strategy led to the creation of Export Processing Zones in Sri Lanka. National labour law clearly curbs the normal trade union rights of the workers.[64] India enacted a Special Economic Zone Act in 2005 but in the face of opposition had to restrict the law to procedures for setting up such zones rather than the regulation of labour relations within such zones. Bangladesh passed the Bangladesh Export Processing Zones Authority Act, 1980 providing for the establishment of EPZs that could attract FDI and increase export earnings. Instructions have been issued to retain a minimum of labour standards in these zones. Despite the enactment of the more recent EPZ Worker Association and Industrial Relations Act of 2004, in Bangladesh, serious allegations of violation of trade union rights in these zones continue.[65] The Bangladesh Labour Act, 2006 prohibits strikes in any industry for the first three years; and this ban is total if the establishment is owned by a foreigner or is established in collaboration with foreigners. Pakistan too follows a system of exempting export zones from the scope of labour laws. Indian labour laws are applicable to such export zones, but their enforcement is deliberately kept weak; prior permission from the Development Commissioner in charge of these

[62] See CEACR 2008 comments.

[63] Report of the CEACR, 80th Session, 2009 (Pakistan).

[64] See ILO, CEACR 75th Session, 2004.

[65] See for example, Report of the CEACR, 77th Session, 2006 on the manner of interference by the Bangladesh Export Processing Zones Authority (BEPZA) and discrimination against leaders of Active Worker Representation and Welfare Committees (WRWCs).

zones is required before inspection can take place, resulting in the enforcement agencies often turning a blind eye to lack of compliance.[66]

Sri Lanka has seen a steady rise in the employment of women in recent years. For instance, the ILO reports that "between 1991 and 2005 women's participation in private sector employment increased by 5.9 per cent, particularly in the professional, technical and related occupations and the skilled and semi-skilled occupations where their participation increased by 14.9 and 10.5 per cent, respectively.... however in the occupational group of "foreman and supervisor" their participation decreased from 29.7 per cent in 1991 to 23.8 per cent in 2005."[67] Sri Lanka has a large number of women who migrate from Sri Lanka as domestic workers, nurses and care workers. In 2008 the government reportedly approved a proposal that would ban women with children under the age of 5 from emigrating for work. The proposed regulation would require mothers with children aged 5 years and above to obtain approval from a government committee after submitting proof that they can provide appropriate childcare. Commenting on this proposal the ILO noted notes that a similar restriction was not imposed on migrating male workers.[68] The ILO Convention No. 111 permits that restrictions on women's employment should be limited to protecting the reproductive capacity of women. However, as the ILO noted this clause is not "aimed at protecting women because of their sex or gender, based on stereotyped assumptions."

C: Discrimination in the Informal Economy.

Legislating for the informal economy has been a challenge for countries in SA. India and Pakistan have taken some steps in this direction.[69]. One of the more blatant forms of discrimination to be seen in these policies is the complete exclusion of unpaid family workers from the scope of legislation or policies. Data reveals that self employment and more particularly own-account enterprises account for the majority of workers in the SA region. Due to the patriarchal control present in the household, women often not only perform domestic work within the household, they also participate fully in the own account enterprises run by the family. Such women are often classified as unpaid family workers, and are invisible in the eyes of labour law since they are not acknowledged as 'workers'. Such women are often the most deprived of all the groups working in the informal sector.

Children often work alongside their parents who are engaged in waged work – a fact that needs to be kept in mind while developing policies to eliminate child labour. Where wages are determined by piece-rates, which are often fixed at very low levels, child labour is often deployed. This is the case in brick-making, construction, agriculture and other forms of home based work. Children work with their parents to increase the family earnings, since working eight hours by a single person may not yield the minimum levels of wages needed by the household. Almost all the approaches to reduce or prohibit the incidence of child labour usually focus on the child as a wage earner. This is because ILO Conventions and labour laws of many countries are premised on a distinction between child labour and child work. Work performed by children within family farms and workshops is not perceived as child labour, and therefore does not fall within the gaze of child labour prohibition laws. There are high numbers of children in unpaid work performed within the home, whether in the form of

[66] For details see, Kamala Sankaran, 'Labour Law in South Asia: Need for an Inclusive Approach' in T. Tekle (ed.) *Workers' Protection and Labour Law in Developing Countries,* Oxford, Hart Publication, 2010.

[67] Report of the CEACR, 79th Session, 2008 (Sri Lanka).

[68] CEACR, 79th Session, 2008.

[69] India has enacted the Unorganised Workers Social Security Act, 2008 to a broad groups of unorganised workers who include workers in both the formal and informal sector who lack protection. The Labour Protection Policy, 2009 of Pakistan seeks to protect to workers in the informal economy, the self-employed, contract workers, seasonal workers and home workers by extending benefits currently available to other workers.

domestic work, care work, or in assisting their parents perform paid home based work. Labour laws and standards prohibit unpaid work performed by children only in the case of objectively identified hazardous work, such as those identified in ILO Convention No. 182. (The ILO's Convention 182 has two categories of the worst forms of child labour: the unconditional worst forms (slave/trafficked labour, compulsory recruitment of children in armed conflicts, prostitution, trafficking in drugs) and in hazardous work which is likely to harm the health, safety, or morals of children.)

As noticed above, countries in SA are now paying greater attention to the informal economy and policies and laws are under consideration in all countries of South Asia. Policies targeting the informal economy include improved social security programmes, including promotional social security, which have the capacity of increasing the livelihoods of those persons and establishments working in the informal economy. Self-employment is the predominant form of employment within the informal economy in many countries in Asia. Gradually increasing the livelihood capacity of such self-employed households would reduce their dependence on child labour. The relatively low presence of social dialogue and collective bargaining in the informal economy to set benchmarks for conditions of work, wages and benefits, has meant a greater state role for regulating conditions of work and creating social security benefits for those in employment relationships in the informal economy.

The capacity of law to create a level playing field in the world of work is hampered by the limited scope of the law itself. The formal law is premised on a traditional understanding of what constitutes 'work', limited to an employer-employee relationship when most of those who work in South Asia are engaged in self-employment. Even for those in employment relationships, the law is hemmed in by restrictions on the kind of establishment, the place of work, the type of work performed, the status or earning capacity of the person working in determining its coverage or scope thus excluding much of the work done in the informal economy, care work done by women within the home, unpaid family labour performed by women and children in activities considered to be 'economically productive'. This has severely limited the capacity of the formal law to deal with discrimination affecting working people in the region. Additionally there is a need to provide a broadening of what can be seen social protection for workers to include the self employed and those outside strict employment relationships. Policies targeting the informal economy include improved social security programmes, including promotional social security, which have the capacity of decreasing the discrimination in the earning capacity and increasing the livelihoods of those persons and establishments working in the informal economy.

South Asian countries are some of the most diverse countries in the world today. One of the challenges in dealing with discrimination arising out of such diversity is the limited role played by the legal framework. The significant informal labour market, which is also highly representative of women and dalits, falls outside the scope of formal regulation. In many of these countries this is compounded by lack of a general anti-discrimination legal/constitutional provision that is not confined to merely state-centric discrimination. Labour movements within the region, too, have not paid adequate attention to organising against such discrimination. Instead, issues of wages, unemployment and social security have been prioritised by trade union/movements for a variety of reasons. As a result, discrimination at work continues to be viewed not as a labour but as a social issue and finds reflection in the growing social and political mobilisation against discrimination in the region.